# 83-1323

NO. _____

SUPREME COURT OF THE UNITED STATES

October Term, 1983

RICHARD C. COX, RALPH J. RANSDELL, SR., PAULA JEAN SYMPSON SMITH — APPELLANTS

V.

LEXINGTON-FAYETTE URBAN COUNTY GOVERNMENT; EDGAR WALLACE, JOHN WIGGINGTON, JOE JASPER, ANNE V. GABBARD, MARY C. McNEESE, J. H. COMBS, ELEANOR H. LEONARD, FRED BROWN, WILLIAM RICE, LYMAN GINGER, PAUL ROSE, CAROL JACKSON, DONALD BLEVINS, ANN ROSS and JAMES TODD, MEMBERS OF THE LEXINGTON-FAYETTE URBAN COUNTY COUNCIL; JAMES G. AMATO, MAYOR OF THE LEXINGTON-FAYETTE URBAN COUNTY GOVERNMENT; LEXINGTON-FAYETTE COUNTY HEALTH DEPARTMENT, GORDON R. GARNER, COMMISSIONER OF PUBLIC WORKS OF THE LEXINGTON-FAYETTE URBAN COUNTY GOVERNMENT — APPELLEES

* * * * * *

On Appeal from the Supreme Court of Kentucky

## JURISDICTIONAL STATEMENT

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## QUESTION PRESENTED - 1(a)

Does a statute [KRS 67A.875(6)] violate the due process clause to the 14th Amendment where the non-evidentiary hearing provided for by that statute is held at a time when a proposed special assessment tax to finance a sanitary sewer project is but an estimate, and landowners are prohibited by that statute from being heard on the amount of the assessment at that hearing, and no hearing or action to challenge the exact amount of the assessment is permitted to land owners when the exact amount of the assessment becomes irrevocably fixed, and a lien upon their properties?

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## QUESTION PRESENTED - 1(a)

Does a statute [KRS 67A.875(6)] violate the due process clause to the 14th Amendment where the non-evidentiary hearing provided for by that statute is held at a time when a proposed special assessment tax to finance a sanitary sewer project is but an estimate, and landowners are prohibited by that statute from being heard on the amount of the assessment at that hearing, and no hearing or action to challenge the exact amount of the assessment is permitted to land owners when the exact amount of the assessment becomes irrevocably fixed, and a lien upon their properties?

## LIST OF PARTIES
## AT SUPREME COURT OF KENTUCKY - 1(b)

The caption of the case in this Court does not contain the names of all the parties to the proceeding in the court whose Judgment is sought to be reviewed. A list of all such parties is footnoted below.[1]

## OPINIONS BELOW - 1(d)

The Opinion of the Supreme Court of Kentucky from which this appeal is taken, is officially recorded in 659 S.W.2d 190, (1983)

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[1]Appellants: Richard M. Conrad, Helen Richardson, Paula Jean Sympson Smith, Ralph J. Ransdell, Sr., Helen M. Pena, Clifford Schlausky, E. J. Wagner and Richard C. Cox.

Appellees: Lexington-Fayette Urban County Government; Edgar Wallace, John Wiggington, Joe Jasper, Anne V. Gabbard, Mary C. McNeese, J. H. Combs, Eleanor H. Leonard, Fred Brown, William Rice, Lyman Ginger, Paul Rose, Carol Jackson, Donald Blevins, Ann Ross and James Todd, Members of the Lexington-Fayette Urban County Council; James G. Amato, Mayor of the Lexington-Fayette Urban County Government; Lexington-Fayette County Health Department; Gordon R. Garner, Commissioner of Public Works of the Lexington-Fayette Urban County Government.

and is set out in full in Appendix D, hereto.

The unreported opinion of the trial court, the Circuit Court, 22nd Judicial District, Third Division in and for Fayette County, Kentucky (Fayette Circuit Court, Civil Action No. 80-180), rendered the 16th day of August, 1982, is set out, in full, as Appendix A, hereto.

JURISDICTION - 1(e)

(i) The nature of this proceeding is an appeal by Richard C. Cox, Ralph J. Ransdell, Sr., and Paula Jean Sympson Smith, who are landowners of property which abut the construction of sanitary sewers by the Lexington-Fayette Urban County Government, a municipality of the Commonwealth of Kentucky.

Appellants appeal from the Final Judgment of the Supreme Court of Kentucky, the highest court in Kentucky, by reason of the Opinion of such court rendered August 31, 1983, and the Order denying Appellants' timely filed Petition for Rehearing, entered November 23, 1983,

which upheld the validity of a state statute which had been drawn in question as being repugnant to the due process clause of the 14th Amendment to the Constitution of the United States of America, and such Judgment of the Kentucky Supreme Court being in favor of validity.

The real property of Appellants has thereby become encumbered by a lien for the amount of a special benefit assessment tax, levied by the Appellee Government as a method to finance the cost of the sanitary sewer project.

The constitutional infirmity of the statute of which Appellants complain relates to the fact that the only hearing afforded Appellants under the statute, as not being held at a meaningful time and under meaningful circumstances as would permit Appellants to contest the amount of the special benefit assessment tax, renders the statute unconstitutional, as depriving Appellants of property without due process of law.

(ii) The date of the entry of the Judgment sought to be reviewed, is August 31, 1983, the date that the Opinion of the Supreme Court of Kentucky was rendered; the date that the Order of the Kentucky Supreme Court denying Appellants' Petition for Rehearing was entered is November 23, 1983[2]; the Notice of Appeal was filed in the Supreme Court of Kentucky was December 12, 1983.

(iii) The statutory provision believed to confer jurisdiction of this appeal on this Court is Title 28 U.S.C. §1257(2).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED - 1(f)

(a) U.S. Constitution:

(i) Amendment 14 - "...nor shall any state deprive any person of... property, without due process of law...."

(ii) Article 6(2) - "This Constitution... shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding."

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[2]Under KRCP 76.30(2)(c) the Opinion, thus, became final on November 23, 1983.

(b) Kentucky Statutes:

KRS 67A.875(6); KRS 67A.875(4); KRS 67A.878; KRS 67A.880; KRS 67A.881; KRS 67A.882 (See Appendix F)

STATEMENT OF MATERIAL FACTS - 1(g)

On January 10, 1980, the legislative body of the Appellee Government (the council) determined, by Ordinance that the subject wastewater collection project, consisting of 1,654 parcels of real estate, required construction.

On March 4, 1980 an Ordinance approving the Preliminary Engineering and Financing Report, as well as the Ordinance of Initiation were passed.

As required by KRS 67A.875(6) and KRS 67A.876, the Ordinance of Initiation ordered a public hearing to be held on March 31, 1980 at the Central Baptist Church in Lexington, Kentucky, at which any owner of property in the proposed project area could appear, and be heard.

Any property owner who spoke at that

hearing was limited to two minutes, could offer no evidence or witnesses, but could be heard, only as to "whether the proposed project should be undertaken, whether the nature and scope of the project should be altered, and whether the project shall be financed through the assessment of benefited properties and issuance of bonds in respect of assessments not paid on a lump sum basis...." [KRS 67A.-875(6)]. Therefore, a hearing on the appropriateness of the amount of the assessment was statutorily forbidden. In addition, only the estimated amount of the assessment was available on the date of that public hearing.

On May 29, 1980, the Ordinance of Determination (KRS 67A.879), determining that the project would be undertaken, was passed. Provision for a levy of a special benefit assessment on each property in the project area was provided for, the specific amount of each such assessment to be later determined after construction bids were solicited and accepted under KRS 67A.882.

On June 30, 1980, these Appellants,

with others, timely filed this action as a class action for declaratory and injunctive relief, challenging the proposed imposition of the special benefit assessment on their properties contending that the statute was unconstitutional, that the Government was proceeding unconstitutionally and asserting numerous issues of state law as to the invalidity of the project. Appellants contended in their Complaint that the public hearing did not rise to the level of constitutional due process as not being held at a meaningful time and under meaningful circumstances.

At the time of the filing of this action, the actual amount of the special benefit assessment with respect to each property was unknown, and unknowable.

KRS 67A.880(2) provides in pertinent part:

> "After the lapse of time as herein provided, all actions by owners of properties to be benefited shall be forever barred."

The "lapse of time" mentioned in the quote

refers to the 30-day permissive litigation period which commenced with the passage and publication of the Ordinance of Determination, a time when the actual special benefit assessment was unknown, and unknowable.

It was specifically raised in the Complaint that the public hearing did not comport with the due process requirements of the 14th Amendment to the U.S. Constitution as not being a hearing at a meaningful time, under meaningful circumstances, and that the levy of the special benefit assessment amounted to a deprivation of property without due process of law.

Beginning on January 18, 1982 a four day trial was had before the court without intervention of a jury. On August 16, 1982, the trial court rendered its Opinion (Appendix A) upholding the project, finding that the "evidence presented concerning the public hearing showed it to be in conformity with the requirements of the statute." (Appendix A, p. A4). Additionally, the trial court in the conclusions of law of its Opinion (Appendix A) concluded:

> "The public hearing held by the defendant government was in conformity with the statutes and is not violative of either the Kentucky or the United States Constitutions." (Appendix A, p. A14).

Thereafter, the original Appellants perfected their appeal to the Kentucky Court of Appeals. Pursuant to an Order of Transfer from the Kentucky Court of Appeals, the Supreme Court of Kentucky rendered its Opinion on August 31, 1983 (Appendix D), affirming the trial court in all respects. With respect to Appellants' contention that the public hearing called for in KRS 67A.875(6) did not pass constitutional muster under the due process clause, the highest court of Kentucky held:

> "The public hearing provided for affected property owners, protected their due process rights, and was constitutional. The assessment is not an unlawful taking of property in violation of the United States Constitution and the Kentucky Constitution. There is no requirement that the public hearing must be a 'trial-type' hearing.
>
> "The fundamental requirement of due process is the opportunity to be heard at a meaningful time and manner. Matthews v. Eldridge, 424. U.S. 319, 47 L.Ed.2d 18, 96 S. Ct. 893 (1976). On March 31,

1980, a public hearing was held on this project at which several property owners spoke on the subject and on the matter of the estimated assessments. No exact figures as to the cost of the benefits were presented because final bidding had not been made. All benefited property owners were given an opportunity to speak at the public hearing as required by statute. The scheduling of the public hearing prior to the determination of exact cost to be assessed does not invalidate the meeting. If a property owner is given an opportunity to be heard at sometime during the assessment proceedings before the liability of his property is fixed, due process is satisfied. Shaw v. City of Mayfield, 204 Ky. 618, 265 S.W.13 (1924).

"The failure of the protestants to persuade a majority of the council is not a violation of due process in and of itself. The ultimate council vote was 11-4 in favor of the third-year sewer project. Clearly they had the opportunity to present their views in a constitutional framework." (Appendix D, pp. D16-D17)

On November 23, 1983 the Kentucky Supreme Court denied Appellants Petition for Rehearing (Appendix E) wherein Appellants' had again sought a declaration that KRS 67A.875(6) was unconstitutional. See KRCP 76.30(2)(c) and (f).

The Government solicited construction bids while Appellants' appeal was pending, and accepted those bids after the Opinion of the Kentucky Supreme Court was rendered upholding the project.

Property owners in the project area, including these Appellants, were thereupon notified of the exact amount of their respective assessments. These Appellants did not pay by lump sum within 30 days of such notice, and by reason thereof a lien for that assessment presently encumbers Appellants' respective properties [see KRS 67A.882(3) and (4)].

SUBSTANTIAL FEDERAL QUESTION - 1(h)

The special benefit assessment levied by the Government becomes (and did become) an encumbrance or lien upon the real property of each owner in the project area. At neither the public hearing under KRS 67A.875(6) nor during the litigation permitted by KRS 67A.880, the only two occasions when the property owners

in the project area are permitted to be "heard" are property owners afforded a hearing at a meaningful time, under meaningful circumstances on the amount of the special benefit assessment.

At the public hearing, property owners are prohibited by KRS 67A.875(6) from being heard on the amount of the special benefit assessment. Both at the time of the public hearing, as well as at the time litigation by property owners is permitted under KRS 67A.880 only the estimated amount of the assessment is known. The actual amount of the special benefit assessment is not and was not determined until the litigation below was concluded, favorable to the project, and construction bids were solicited and accepted all as provided in KRS 67A.882. At that point, the statutes (KRS 67A.871 to -.894) authorize no further hearings, and KRS 67A.880(2) specifically bars any civil action by any owner of property in the project area, which would include a prohibition against any action contesting the actual amount of the special benefit assessment.

After the litigation concluded favorably to the project at the trial court level, and while the appeal to the Supreme Court of Kentucky was pending, the Government solicited construction bids for the construction of the project. After the Opinion of the Supreme Court of Kentucky was rendered upholding the project against the contentions of these Appellants, the Government accepted the construction bids, and thereupon computed the actual special benefit assessment to be levied upon each property in the project area including the property of these Appellants. Thereupon the Government notified owners of the "exact amount" to be levied against individual properties, apprising them of their option to pay in full on a lump sum basis, within 30 days of the notice, the full amount of the special benefit assessment, or their properties would be subjected to an assessment levy, annually, to retire bonds which would be issued in an amount to cover construction costs not covered by those paying

by lump-sum, all as provided in KRS 67A.882(3).

These Appellants did not pay the lump sum amount within the 30-day period mentioned, and, therefore, their respective properties have been, and are, subject to the annual levy to retire the bond issue.

This court, in Londoner v. Denver, 210 U.S. 373, 52 L.Ed. 1103, 28 S.Ct. 708 (1907), voided a special assessment of the City and County of Denver levied upon abutting lands in connection with the cost of paving a street and discharged the lands from a lien for the assessment. At 210 U.S. 373, 378 this court held:

> "The proceedings, from the beginning up to and including the passage of the Ordinance authorizing the work did not include any assessment or necessitate any assessment, although they laid the foundation for an assessment, which might or might not subsequently be made. Clearly all this might validly be done without hearing to the landowners, provided a hearing upon the assessment itself is afforded. Voigt v. Detroit, 184 U.S. 115; Goodrich v. Detroit, 184 U.S. 432." (Emphasis added)

The statute involved in Londoner afforded land owners an opportunity to be heard upon the validity and amount of the assessment, after the cost of the work was determined, with the council sitting as a board of equalization. The Kentucky statute involved here authorizes no such hearing. If it did, it would be constitutional, under Londoner. The statute in Londoner, however, was administered in the same manner that the Kentucky statute is written. The denial of due process in Londoner, which led to the voiding of the assessment and discharge of the lien therefor, was, that although the land owners were allowed to file complaints and objections, they were not afforded an opportunity to be heard on the amount of the assessment.

This court in Londoner at 210 U.S. 373, 385-386 reaffirmed the following rule:

> "...where the legislature of a state, instead of fixing the tax itself, commits to some subordinate body the duty of determining whether, in what amount, and upon whom it shall be levied, and of making its assessment and apportionment, due process of law requires that at some stage of

> the proceedings before the tax becomes irrevocably fixed, the tax payer shall have an opportunity to be heard, of which he must have notice, either personal, by publication, or by a law fixing the time and place of the hearing." (citing cases) (Emphasis supplied).

Just as KRS 67A.880(2) denies the land owners here the right to object in the courts to the assessment when the tax becomes irrevocably fixed, this court in Londoner pointed out that the law of Colorado was to the same effect. That provision of the Colorado law had a direct bearing on this court's decision to void the assessment and discharge the lien on account of it.

Kentucky's highest court has dealt often with what the appropriate amount of a special assessment must be. The hearing to which Appellants were entitled, but denied, by KRS 67A.875(6), and by operation of KRS 67A.882 and KRS 67A.880(2), would involve principles of Kentucky law.

Book v. Trigg, 186 Ky. 664, 217 S.W. 1013 (1920) holds that special benefit assessment taxes will be upheld only if the proposed

improvements confer special benefits upon the lands assessed, but only to the extent of the value of such benefits.

Wells v. West, 228 Ky. 737, 15 S.W.2d 531 (1929) held that the Kentucky and U.S. Constitutions, as forbidding the taking of private property without just compensation, forbid the courts from enforcing any proposed special benefit assessment for a public improvement which results in spoliation (the assessment is greater than the value of the property), or when benefits to the property are less than the burdens of the assessment. To the same effect is National Cast Iron Pipe Co. v. City of Paducah, 299 Ky. 434, 185 S.W.2d 692 (1944).

> "This Constitution...shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding." U.S. Constitution, Article 6(2).

This Court's ruling in Londoner, that due process requires that landowners be afforded a hearing on the amount of a special assessment tax before liability for the tax is fixed, was made known to the Kentucky Supreme Court by

Appellants. Contrary to the provisions of the "supremacy clause", quoted above, the majority of the Kentucky Supreme Court ignored this court's definition of the requirements of due process under the 14th Amendment when a municipality proposes to levy a special assessment on land owners. Instead, the Kentucky Court sought refuge in Matthews v. Eldridge, 424 U.S. 319, 47 L.Ed.2d 18, 96 S.Ct. 893 (1976), a wholly inappropriate authority.

At issue in Matthews was whether a social security disability benefit recipient was entitled under the due process clause to a hearing before termination of benefits, or whether the evidentiary hearing provided for by law after termination of benefits, satisfied due process. The issue here, however, is that the denial of due process complained of, is that landowners at no time are given a hearing, either before or after the levy of the assessment.

The assessment formula used by the Government established 12 zones, with arbitrary

upper and lower limits for each zone based upon a combination of road front footage, and total valuation of land and improvements,[3] as reflected by the records of the property valuation administrator. Zone I was arbitrarily assigned and estimated special assessment tax of $2,026.00, and each succeeding zone was increased by an increment of 10 percent, rising to $5,782.00 for Zone XII (See Appendix G).

The high reliability of the medical data which could lead to termination of social security disability benefits, led this court to conclude, in Matthews, that the evidentiary hearing afforded that aggrieved social security recipient after termination, satisfied due process. The arbitrary formula used by the Government (See Appendix G) is without reliability insofar as satisfying the principles of Kentucky law, as to what amount a special assessment may validly

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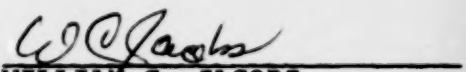
[3] KRS 67A.871(1) does not permit the use of the value of improvements, if "assessed value basis" is used, as it was used for levying the special assessment under KRS 67A.875(5).

be. Principally because landowners are given no opportunity to be heard on the actual amount of the assessment before liability is fixed (or after, for that matter) and, secondarily, because the formula used by the Government in estimating, and then ultimately, levying the assessment is without reliability in arriving at what the assessment ought to be, Matthews is no authority whatsoever for upholding the constitutionality of the statute.

The guarantee of the 14th Amendment against deprivation of property without due process is a substantial and fundamental right. That these Appellants were afforded no hearing either under the statute or as the statute was administered on the amount of the assessment is beyond dispute. The Kentucky Supreme Court refused to follow this court's explanation of what due process means, when a special assessment is sought to be levied, as set out in Londoner. In light of the supremacy clause, this Court ought to give plenary consideration of the

question presented, with briefs on the merits and oral argument, to the end that a clearly unconstitutional statute may be stricken, and the unconstitutional deprivation of Appellants' property may be remedied, by voiding the lien for the illegal special assessment.

Respectfully submitted,



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FAYETTE CIRCUIT COURT
CIVIL BRANCH
THIRD DIVISION

RICHARD M. CONRAD,
ET AL. PLAINTIFFS

AUG 16 1982

VS. OPINION NO. 80-CI-1980

LEXINGTON-FAYETTE
URBAN COUNTY
GOVERNMENT, ET AL. DEFENDANTS

* * * * * * *

This case was tried before the Court without the intervention of a jury from January 18, 1982 through January 21, 1982. At the trial evidence was introduced on behalf of plaintiffs and defendants. The plaintiffs filed a complaint under the provisions of KRS 76A.880 (sic), which abated the action of the defendant government in carrying out a public improvement project which has been referred to as the Third Year Sanitary Sewer Project. It appears that the plaintiffs have followed the statutory provisions of KRS 67A.880 in filing this action. Subsequent to the trial, all parties filed "tons" of authorities and memoranda outlining their positions.

Based upon the evidence, the record, exhibits, and the voluminous memoranda, the Court makes the following findings of fact corresponding to the numerical counts in plaintiffs' complaint.

COUNT I

1. The Ordinance of Initiation and Ordinance of Determination were published on March 12, 1980 and June 3, 1980, respectively, in The Lexington Leader.

2. The Lexington Herald had the largest circulation in the publication area (Fayette County) at the times of said publications. Both newspapers are owned and published by the same corporation, The Lexington Herald-Leader Company.

3. The Lexington Leader newspaper previously had the largest circulation in the publication area and that all communications from the Lexington Herald-Leader Company to the Clerk of the Urban County Council until the filing of this lawsuit was to the effect that The Lexington Leader newspaper continued to maintain the highest circulation.

4. Widespread publicity was given to the Third Year Sewer Project via the local media and individual notices were mailed to property owners advising them of the public hearing on the property and the adoption of the Ordinance of Determination.

5. The plaintiffs made no showing that either they, or anyone else, was prejudiced by the publication of the ordinance in The Lexington Leader rather than The Lexington Herald.

COUNT II

1. KRS 67A.871 through KRS 67A.894 (Sanitary Sewer Act) is applicable only to urban-county governments and grants them an alternative authority for the construction and installation of sanitary sewer facilities.

2. At the present time, 119 of the 120 counties in Kentucky may choose the urban-county form of government.

3. An urban-county government is faced with unique situations in developing uniform community-wide sewer facilities.

4. There is only one urban-county form

of government presently adopted in the Commonwealth of Kentucky.

COUNT III AND V

1. A well-attended public hearing on the Third Year Sanitary Sewer Project was held on March 31, 1980 at the Central Captist (sic) Church. The plaintiffs presented no evidence to contradict other evidence presented that all property owners were given an opportunity to be heard at the public hearing.

2. All evidence presented concerning the public hearing showed it to be in conformity with the requirements of the statute.

COUNT IV

1. Approximately 90% of the total costs of the project are to be paid through the special assessments against the benefited properties. The other approximate 10% of the total costs were to be paid by the defendant Urban County Government and, as such, shared by all the taxpayers of Fayette County. These latter costs included trunklines, force mains, pumping stations, oversizing of certain sewer

lines, and engineering costs in respect of those items, as well as certain resident inspection costs.

COUNT VI

1. The assessment to be made against the benefited parcels is a special assessment for improvements.

2. That no "trial-type hearing" was held, nor was one provided for under the Sanitary Sewer Act.

3. The defendant Urban County Government was acting in a legislative manner in implementing the Third Year Sanitary Sewer Project.

COUNT VII

1. The plaintiffs filed this action on June 30, 1980, and within thirty (30) days after the publication of the Ordinance of Determination on June 3, 1980.

COUNTS VIII, IX, X, XI, XII, XIII, XIV, XV, XVI, XVIII, XXV, XXXVI, XXXVII, XXXVIII, XL, AND XLI

1. These counts contained only issues of law and no evidence was presented to any factual questions therein.

COUNT XVII

1. The project was designed to serve, by gravity flow, ground flow, ground floor level improvements and above.

2. Some properties in the project will be provided with gravity flow sewer service to basement level improvements and the vast majority of parcels will not be provided such service.

3. The assessment procedure adopted by the defendant council and government did not make any distinction between those parcels provided with gravity flow basement service and those parcels not so provided.

COUNTS XIX AND XX

1. Ample evidence was presented to show that the Urban County Council was presented with sufficient data to make the legislative determination that the public health, safety and general welfare required construction of the Sanitary Sewer Project.

2. No evidence of fraud or illegality in the actions of the Urban County Council was produced by plaintiffs and such action was

certainly not arbitrary, nor capricious.

3. Health Department surveys of the subject areas were presented to the Council in 1975; the Council had received the views and recommendations of several specialists in the health field; and considerable discussion by the Council predated the enactment by the Council of its determination that the public health, safety and general welfare required construction of the subject Sanitary Sewer Project.

4. Additional and supplementary Health Department surveys were made and reported to the Council which ratified its actions in Ordinance No. 2-80 by ordinances adopted subsequent to the adoption of Ordinance 2-80.

COUNTS XXI AND XXXIV

The Urban County Government entered into contracts with engineers and attorneys prior to the enactment of Ordinance No. 2-80 (which determined that the public health, safety and general welfare required construction of the Sanitary Sewer Project).

COUNT XXII

1. Defendant Gordon R. Garner was and is the Commissioner of Public Works of the Defendant Lexington-Fayette Urban County Government. Mr. Garner is a duly licensed engineer in the Commonwealth of Kentucky and other states.

2. The Preliminary Engineering and Financing Report was prepared under the direction of Mr. Garner. Consulting engineers prepared cost estimates and submitted same to Mr. Garner's office upon which a portion of the Preliminary Engineering and Financing Report was prepared.

3. The Preliminary Engineering and Financing Report contains sufficient material to satisfy the requirements of KRS 67A.875 regarding the contents of said report.

COUNT XXIII

1. The $679,023.98 sum referred to in this count of the complaint is excluded from the costs that the benefited property owners must pay by special assessment.

COUNT XXIV

1. The Ordinance of Initiation sufficiently outlines the nature and scope of the Third Year Sanitary Sewer Project.

COUNTS XXVI, XXVII, XXVIII, XXIX AND XXX

1. The assessment procedure adopted by the Urban County Council provided for twelve (12) different assessment zones and therefore twelve (12) different assessments.

2. The Urban County Council was presented with sufficient data to determine that the groups of benefited properties within each of such zones were to be benefited in substantially the same manner and to substantially the same degree.

3. No evidence of inequitable assessments was presented at the trial of this matter by plaintiffs.

4. No evidence was introduced by plaintiffs of any fraud or illegality in the Council's actions.

COUNTS XXXI, XXXIII, AND XXXV

No evidence was introduced by plaintiffs to support the allegations of these counts in

the complaint.

COUNT XXXII

1. Prior Health Department approval of septic tank use on parcels in the project area were conditioned upon the parcels' connection to sanitary sewers as they became available.

2. No evidence supporting the estoppel argument of plaintiffs was presented at the trial.

AMENDED COMPLAINT

1. Ordinance No. 2-80 was given first reading on December 20, 1979, second reading and passage on January 10, 1980.

2. That there was some change of membership on the Urban County Council between the first and second reading of the above ordinance.

3. The ordinance approving the Preliminary Engineering and Financing Report was passed prior to the passage of the Ordinance of Initiation.

Based upon the foregoing findings of fact, the Court makes the following conclusions

of law:

1. Due to the widespread publicity, individual notice to property owners, publication in a newspaper of nearly equal publication, and the failure of plaintiffs to show any prejudice by the publication of the Ordinance of Initiation and Ordinance of Determination in the Lexington Leader rather than the Lexington Herald, it is concluded that the defendant government substantially complied with the publication requirements in this instance. See Queenan v. City of Louisville, Ky., 233 S.W.2d 1010 (1950) and Lime v. County of Warren, Ky., 325 S.W.2d 302 (1959).

2. KRS 67A.871 through KRS 67A.894 (Sanitary Sewer Act) is not special legislation and does not violate Sections 59 or 156 of the Constitution of Kentucky. The Sanitary Sewer Act is available for use by any of the 119 counties in Kentucky which would choose the Urban-County form of government. Although the Lexington-Fayette Urban County Government is the only Urban-County Government presently

in existence, this does not render legislation which is applicable only to that municipality unconstitutional. See City of Louisville v. Klusmeyer, Ky., 324 S.W.2d 831 (1959). It is hereby concluded that Urban-County Governments face a unique situation in providing for uniform Sanitary Sewer facilities throughout their boundaries not faced by other forms of government and that this alternative method of construction and financing Sanitary Sewer facilities is a reasonable basis for classifying the act applicable to Urban-County Governments solely.

3. This Court has recognized that where the Urban County Council acts in a legislative manner, as opposed to an adjudicatory manner, no "trial-type hearing" is required. Tackett v. Lexington-Fayette Urban County Government, Fayette Circuit Court, 76-148.

The Fayette Circuit Court has held that a public hearing, required for expansaion (sic) of urban services under the charge of the Lexington-Fayette Urban County Government, is

not required by due process to be a trial-type hearing. Davega v. Lexington-Fayette Urban County Government, Fayette Circuit Court, No. 75-1941. The Court held that expansion of service and increase of ad valorem taxes is a legislative determination in that it is of general application and the facts to be considered do not relate to a particular individual or to the status of his property. Similarly, the determination of installation of the Third Year Sanitary Sewer Project, the benfits (sic) conferred, and the assessment basis used is a determination of general application throughout the areas within the project. Due process does not require a trial-type hearing for legislative action. See City of Louisville v. McDonald, Ky., 470 S.W.2d 173 (1971).

4. The proposed assessments under the Third Year Sanitary Sewer Project are special charges levied against properties particularly benefited and as such are not subject to equal protection or uniformity requirements. See Miller v. City of Ashland,

Ky., 221 S.W.2d 620 (1949). Such special assessments are not taxes per se and are not subject to constitutional provisions governing taxes. See Robertson v. City of Danville, Ky., 291 S.W.2d 816 (1956).

5. The public hearing held by the defendant government was in conformity with the statutes and is not violative of either the Kentucky or the United States Constitutions.

6. (The allegations in this Count have been answered elsewhere.)

7. The thirty (30) day litigation period provided for in KRS 67A.880 (or fortyfive (sic) days if certain action is taken) is not an unreasonably short period of time and well within the power of the Kentucky General Assembly to enact.

8. Plaintiffs failed to sustain their burden of proof that KRS 67A.881 was unconstitutional.

9. That the proper interpretation of KRS 67A.882(3), when read in connection with KRS 67A.892, is that KRS 67A.892 is controlling, and that if by reason of miscalculation or the

happening of unforeseen events or conditions, the proceeds of the bonds authorized by the ordinance of bond authorization should prove to be insufficient to provide for the completion of the project and the payment in full of all costs thereof, the Urban-County Government shall be responsible for any such deficiency.

10. That it is within the sound discretion of the Urban County Council as to whether interest should be paid to the owners of those parcels which pay by the lump-sum method.

11. See Number 9 above.

12. Subsection (d) of KRS 67A.883 applies only to those parcels for which lump-sum payment has not been made. Subsection (a) of 67A.883 excepts properties, as to which lump-sum payment has been made, from the lien to secure the bonds.

13. KRS 67A.884 concerning liens against properties in connection with an Assistance Agreement with the Kentucky

Pollution Abatement authority does not apply to parcels which have paid by lump-sum.

14. The allegations in this Count are without merit.

15. The issuance of municipal bonds for the construction of sewer systems without a vote by the people has long been held a valid, reasonable, and nondiscriminatory exercise of a city's powers with the Constitutions of the United States and Kentucky. Davis v. Water-Sewer and Sanitation Commission of Bowling Green, 223 F. Supp. 902 (W.D. Ky., 1963) and Brown v. City of Harrodsburg, Ky., 252 S.W.2d 44, (1952).

As to liability provisions such as the one herein questioned, there is no violation of either statute or Kentucky Constitution by their inclusion in KRS 67A.886. The Kentucky Constitution's Section 157 prohibit certain forms of indebtedness without a public vote; however, a city's liability because of negligence or carelessness is not included therein. Knepfle v. City of Morehead, Ky., 192 S.W.2d 189 (1946).

16. The refund referred to in the last sentence of KRS 67A.891 refers to benefited properties which did not pay by lump-sum payment.

17. The allegations contained in Count XVII of the complaint fail to point out any invalidity of KRS 67A.893.

18. There is no showing that KRS 67A.894 is invalid in any respect.

19. As stated above, the defendant government's determination that the public health, safety, and general welfare require construction of a Sanitary Sewer System is a legislative rather than adjudicative determination and neither a trial-type hearing nor specific findings of fact are required. See Board of Levee Commissioners of Fulton County v. Johnson, Ky., 199 S.W. 8 (1917). See City of Louisville v. McDonald, Ky., 470 S.W.2d 173 (1971) for a discussion of the distinction between the legislative and adjudicative fact finding. The necessity, character and extent of a public improvement are matters within the discretion of the legislative body and courts

will not interfere with such discretion, unless it is abused. See City of Tompkinsville v. Miller, Ky., 241 S.W. 809 (1922). The burden of proof that the actions of the legislative body were erroneous, arbitrary, fraudulent or illegal, is squarely upon the party who seeks to challenge the exercise of the legislative body. See Louisville & Jefferson Co. Metropolitan Sewer Dist. v. Joseph E. Seagram & Sons, 307 Ky. 413, 211 S.W.2d 122 (1948). The plaintiffs in this case failed to sustain this burden of proof and the testimony elicited at the trial amply demonstrated the need and thorough consideration by the Council in making its determination.

20. (See Number 19 above.)

21. In Count XXI the plaintiffs contend that the contracts between the defendant government and the consulting engineering firms are invalid due to the fact that they were entered into prior to the date of the passage of Ordinance No. 2-80 which determined the need for the project. This Court concludes that KRS 67A.875(1) does not make it a mandatory

requirement that the Ordinance be passed before the contracts with the engineers. Even if this Court determined that the statute implied tha (sic) the Ordinance should be passed first, this Court concludes that such requirement is directory instead of mandatory as it does not reach the substance of the matter, and plaintiffs have failed to show any prejudice to the property owners due to any failure to observe the proper timing. Therefore, neither the contracrts (sic) nor the appropriation of funds thereto are unlawful. See Fannin v. Davis, Ky., 385 S.W.2d 321 (1964).

22. The Preliminary Engineering and Financing Report prepared under the direction of the defendant Gordon R. Garner, Commissioner of Public Works of the defendant government, satisfies the requirements of KRS 67A.875(2) and the plaintiffs failed to present any evidence showing any deficiency therein.

23. This Count in plaintiff's complaint alleges that a $679,023.98 sum should be excluded from the costs of the project paid for by the benefited parcels. The evidence clearly

showed that this sum was excluded from the costs and the Court concludes that this Count is without merit.

24. The Ordinance of Initiation sufficiently outlines the nature and scope of the Third Year Sewer Project.

25. In Count No. XXIII, the plaintiffs allege that certain language in the Ordinance of Initiation could be construed to mean that the non-lump-sum payers would pay a disproportionate share of the costs of the project. Although there had been no showing by the plaintiffs that such unequal costs are contemplated by the defendant government, this Court concludes that no such action may be taken by the defendant government. The only costs that may be added to the project after the payment by the lump-sum payers, must be costs properly allocated to the bond issue.

COUNTS 26, 27, 28, and 30

These Counts concern the assessment procedures and formula adopted and instituted by the defendant government. KRS 67A.875(5) authorizes the Urban-County Council to classify

benefited properties into one or more assessment zones should the Council determine that the benefited properties within the zones receive substantially similar benefits. The Council made such determination and since there was no showing by plaintiffs that such determination was improper, these Council actions must stand.

31. Since no evidence was presented by plaintiffs concerning the allegation of Count No. 31, this Court must conclude it was without merit.

32. The allegations in this Count are without merit.

33. The allegations in this Count by the plaintiffs are without merit as no evidence was introduced by plaintiffs in respect to it.

34. (See Number 21 above.)

35. No evidence was presented by plaintiffs with respect to this Count and therefore it is without merit.

36. These allegations are without merit.

37. The allegations in this Count are without merit.

38. (See Number 2 above.)

39. This Court has previously ruled on the issue of whether the suit should be maintained as a class action.

40. This Court denies the permanent injunction sought by plaintiffs.

41. This Count is without merit.

The Clerk is directed to make this opinion a part of the record and it shall be considered the Court's findings of fact and conclusions of law, and the attorneys of record shall prepare a proper judgment in accordance herewith.

/S/ Armand Angelucci
JUDGE ARMAND ANGELUCCI

I hereby certify that a true copy of the foregoing opinion has been mailed to Hon. William C. Jacobs, 173 North Limestone Street, Lexington, Kentucky 40507; Hon. George W. Mills, 400 Bank of Lexington, 101 East Vine Street, Lexington, Kentucky 40507; and Hon. Paul Collins, 600 Merrill Lynch Plaza, 100 East Vine Street, Lexington, Kentucky 40507 on

this the 16 day of August, 1982.

ROBERT M. TRUE, CLERK
FAYETTE CIRCUIT COURT

BY /S/ Wilma L. Fields, Deput

A TRUE COPY

ATTEST: ROBERT M. TRUE, CLERK
FAYETTE CIRCUIT COURT

BY: /S/ Wilma L. Fields DEPUTY

FAYETTE CIRCUIT COURT
CIVIL BRANCH
THIRD DIVISION

RICHARD M. CONRAD,
ET AL. PLAINTIFFS

SEP 3 1982

V. JUDGMENT NO. 80-CI-1980

LEXINGTON-FAYETTE
URBAN COUNTY
GOVERNMENT, ET AL. DEFENDANTS

* * * * * * *

This action having been tried before the Court without the intervention of a jury from January 18, 1982 through January 21, 1982 and the parties having filed memoranda in support of their respective positions, and the Court having made its Findings of Fact and Conclusions of Law with respect thereto, the same having been filed of record, and such Findings of Fact and Conclusions of Law being incorporated herein by reference,

IT IS HEREBY ORDERED AND ADJUDGED as follows:

1. That KRS 67A.871 through KRS 67A.894 (Sanitary Sewer Act) is constitutional.

2. That the defendant, Lexington-Fayette Urban County Government, has complied

with the provisions of the Sanitary Sewer Act with respect to establishing the public improvement project mentioned in Plaintiff's Complaint.

3. The Sanitary Sewer Act permits the Urban-County Government to pay interest earned on lump sum payments to the owners of those parcels which paid on a lump sum basis.

4. That the Complaint and Amended Complaint of the Plaintiffs are dismissed, costs to be paid by plaintiffs.

5. That the Defendant, Lexington-Fayette Urban County Government, may proceed with the sanitary sewer project as outlined and adopted by the Urban County Council in Ordinance No. 52-80, also known as the Ordinance of Determination, which was adopted on May 29, 1980 and published on June 3, 1980 and which was filed as an exhibit in the record.

6. There being no just reason for delay and the judgment having adjudicated all the claims between the parties this is a final judgment.

/S/ Armand Angelucci
JUDGE

TO BE ENTERED IN
CONFORMITY WITH
THE RULINGS OF THE
COURT; NOTICE OF
ENTRY WAIVED

seen but has

not signed

William C. Jacobs
Attorney for Plaintiffs

HARBISON, KESSINGER, LISLE & BUSH

By /S/ George W. Mills
George W. Mills
Attorney for Defendants
Other than Lexington-Fayette
County Health Department

GREENEBAUM, DOLL & McDONALD

By /S/ Phillip D. Scott
Phillip D. Scott
Attorney for Defendant
Lexington-Fayette County
Health Department

A TRUE COPY
ATTEST: ROBERT M.
TRUE, CLERK
FAYETTE CIRCUIT
COURT

BY:/S/ C. McQuinn
DEPUTY

I hereby certify that a true copy of the foregoing order has been mailed to Hon. William C. Jacobs, 173 North Limestone Street, Lexington, Kentucky 40507 on this the ____ day of September, 1982.

ROBERT M. TRUE, CLERK
FAYETTE CIRCUIT COURT

BY_____,
Deputy

FAYETTE CIRCUIT COURT
CIVIL BRANCH
THIRD DIVISION

RICHARD M. CONRAD,
ET AL. PLAINTIFFS

OCT 19 1982

V. ORDER NO. 80-CI-1980

LEXINGTON-FAYETTE
URBAN COUNTY
GOVERNMENT, ET AL. DEFENDANTS

* * * * * * *

This cause came on to be heard before the Court after the filing of a motion to amend findings and a judgment under Civil Rule 52.02, said motion having been filed by the plaintiffs on September 13, 1982. Subsequent to the filing of said motion, the Court granted a hearing and had the benefit of listening to oral arguments of counsel concerning this motion.

Plaintiffs' counsel presented some seventy objections, specifically enumerating them, as to why the Court's opinion and findings should be amended, and counsel for the defendants, subsequent to said arguments, presented argument in opposition thereto.

After a review of the Court's opinion,

which was filed August 6, 1982, and the judgment entered September 3, 1982, the Court is of the same opinion and it will adopt the original findings of fact and conclusions of law.

This order therefore overrules the motion of the plaintiffs seeking to amend said findings, and adopts the judgment as entered September 3, 1982. This order shall be a final order.

The Clerk is directed to mail copies of this order to the attorneys of record.

/S/ Armand Angelucci
JUDGE ARMAND ANGELUCCI

A TRUE COPY
ATTEST: ROBERT M. TRUE, CLERK
FAYETTE CIRCUIT COURT

BY: /S/ Robert D. True DEPUTY

I hereby certify that a true copy of the foregoing order has been mailed to Hon. Phillip D. Scott and Hon. Paul R. Collins, 600 Merrill Lynch Plaza, P.O. Box 1808, Lexington, Ky. 40507; Hon. William C. Jacobs, 173 North Limestone Street, Lexington, Kentucky 40507; and Hon. George W. Mills, 400 Bank of Lexington, Lexington, Kentucky 40507 on this the ____ day of October, 1982.

ROBERT M. TRUE, CLERK
FAYETTE CIRCUIT COURT

BY _____, Deputy

SUPREME COURT OF KENTUCKY

82-SC-963-TG

RENDERED: Aug. 31, 198

RICHARD M. CONRAD, HELEN RICHARDSON, PAULA JEAN SYMPSON SMITH, RALPH J. RANSDELL, SR., HELEN M. PENA, CLIFFORD SCHLAUSKY, E.J. WAGNER and RICHARD C. COX — APPELLANTS

To Be Published

APPEAL FROM FAYETTE CIRCUIT COURT
HON. ARMAND ANGELUCCI, JUDGE
CIVIL ACTION NO. 80-CI-1980

V.

LEXINGTON-FAYETTE URBAN COUNTY GOVERNMENT; EDGAR WALLACE, JOHN WIGGINGTON, JOE JASPER, ANNE V. GABBARD, MARY C. McNEESE, J. H. COMBS, ELEANOR H. LEONARD, FRED BROWN, WILLIAM RICE, LYMAN GINGER, PAUL ROSE, CAROL JACKSON, DONALD BLEVINS, ANN ROSS and JAMES TODD, MEMBERS OF THE LEXINGTON-FAYETTE URBAN COUNTY COUNCIL; JAMES G. AMATO, MAYOR OF THE LEXINGTON-FAYETTE COUNTY GOVERNMENT; LEXINGTON-FAYETTE COUNTY HEALTH DEPARTMENT, GORDON R. GARNER, COMMISSIONER OF PUBLIC WORKS OF THE LEXINGTON-FAYETTE URBAN COUNTY GOVERNMENT — APPELLEES

FINAL

DATE NOV 23, 1983

/S/Rose Tomlinson D.C.

OPINION OF THE COURT
BY JUSTICE WINTERSHEIMER

AFFIRMING

* * * * *

This appeal is from a judgment entered September 3, 1982, which determined that the Lexington-Fayette Urban County Government may proceed with a sanitary sewer project because it complied with the provisions of the sanitary sewer act. Various property owners sought declaratory and injunctive relief challenging the proposed imposition of the special sewer assessment as unconstitutional.

The principal question presented is whether KRS 67A.871 is special legislation and therefore unconstitutional. Other issues raised are whether the government was required to strictly comply with the publication statutes, whether the council was required to set out adjudicative facts in support of the ordinance of initiation, whether the improvement benefit assessment formula was constitutional, and whether it was properly based on assessed value pursuant to statute, whether the government complied with the due process hearing requirements in connection with the public hearing, whether the government failed to comply with the actual notice

requirements of the act in relation to the public hearing, whether the 30-day litigation period is unreasonable because it accrues before the actual cost of the project is known, whether the outside contracts entered into by the government with engineering and legal firms are void, whether the circuit court properly refused to allow this action to be maintained as a class action, and whether it was error to refuse to enjoin the project from proceeding.

This Court affirms the judgment of the circuit court because the statute is constitutional and the method of assessment valid.

The General Assembly was within its constitutional authority to provide authorization for urban county governments to construct and maintain waste water collection projects. Such authority is merely a logical extension of the legitimate power of any municipal government.

The project in question is known as the "third-year sewer project" and encompasses eight neighborhoods in Lexington-Fayette

County, involving 1,657 parcels of property. In the original complaint, the appellants alleged 41 counts. On appeal, they present twelve arguments. A four-day trial was conducted beginning January 18, 1982, before the circuit judge without a jury. The evidence consisted principally of each property owner testifying and most of the city council members as well as various government engineers and employees, the Commissioner of Health and a real estate appraiser. The government presented proof in support of their decision to establish the sewer project, and the property owners testified that they did not want, nor believe that they really needed sewers. Judgment was entered on September 3, 1982, and the appeal of the property owners was transferred to this Court on March 30, 1983.

The Urban County Government statute, KRS 67A.871 through 67A.894, is not special legislation and does not violate Section 59 or Section 60 or Section 156 of the Kentucky Constitution. The classification of urban county government by the legislature has been

found to be a reasonable classification. Holsclaw v. Stephens, Ky., 507 S.W.2d 462 (1974). The fact that there is presently only one urban county government does not mean that the law is unconstitutional. City of Louisville v. Klusmeyer, Ky., 324 S.W.2d 831 (1959). The Urban County Sewer Act is an appropriate classification and bears a reasonable relation to the purpose of the act. Such a government is authorized to plan, develop, initiate and finance waste water collection projects. KRS 67A.872. The testimony of a former mayor explains the purpose of the act and provides a basis for the finding by the circuit judge. Where a merged government is established, it is necessary to have an equitable means of extending sanitary sewers to older neighborhoods in former county areas. The act created a reasonable method of extending sewers and fairly assessing the costs of construction.

The appellants' argument that the act does not cover second-class cities with sewage problems is unconvincing. Those cities do not

present the same situation as an urban county government because the areas of their jurisdiction do not encompass unsewered county territory. The act cannot be considered special legislation because the classification is not as broad as it could have been drawn. Commonwealth, ex rel Hancock v. Davis, Ky., 521 S.W.2d 823 (1975).

United Dry Forces v. Lewis, Ky., 619 S.W.2d 489 (1981), is distinguishable because the court found that a statutory proceeding authorizing wet/dry elections did not refer to the stated purpose of the statute and therefore did not reasonably relate to its purpose. Here, the law did relate to the legislative purpose of the act. Even considering United Dry Forces, supra, the act is not special legislation.

Additionally, legislative action is generally presumed to be constitutional. Holzclaw (sic) v. Stephens, supra. Folks v. Barren County, Ky., 313 Ky. 515, 232 S.W.2d 1010 (1950). At trial, there was no evidence or substantial argument to overcome the presumption

of constitutionality which must be accorded the act. Here there is a reasonable relation between the classification or urban county government and the purpose of the act. The circuit court is affirmed.

The failure of the government with regard to KRS 424.120(1)(B), is not reversible error. There was compliance with the law requiring publication. The circuit court determined that publication in the Lexington Leader, which is owned and published by the same corporation that owns and publishes the Lexington Herald, was sufficient. Actually the Herald has a larger circulation than the Leader. The Court determined that the project received widespread publicity. All communication to the government's clerk had indicated that the Leader had the largest circulation. Furthermore, individual notices were mailed to the property owners advising them of the public hearing. There was no showing of any prejudice as a result of the erroreous (sic) selection of a newspaper.

The government believed that the Leader

was the newspaper with the largest bona fide circulation because the previous written and oral communications from the publishing company had so indicated. In addition, the employee of the Lexington-Herald Leader company in charge of advising customers as to circulation figures for the purpose of running legal notices assumed the Leader to be the proper newspaper in which to publish legal notices. Prior to this lawsuit, all legal notices of the Board of Education, Lex Tran, Board of Health, airport board and the planning commission were published in the Leader. The Leader did have the highest circulation until after March 1977. It was not until September 1980, that the government was informed of the change in circulation leadership.

Substantial compliance in regard to publication requirements has been authorized in Queenan v. City of Louisville, Ky., 233 S.W.2d 1010 (1950). The purpose of the statute is to allow the public an ample opportunity to become sufficiently informed

on the public question involved. Substantial compliance was also affirmed in Lyon v. County of Warren, Ky., 325 S.W.2d 302 (1959). There the court considered the widespread publicity relating to the bond issue and a large voter turnout. Here there was considerable publicity about the initiation of the sewer project by means of radio, television as well as newspaper coverage. Consequently, the purpose of the statutory requirements of notification by publication was achieved. The trial judge was correct in determining that substantial compliance had been achieved.

It should be noted that the appellants in raising the question of inadequate notification are the very persons who have initiated the lawsuit, indicating that they were not denied notification. The appellant's contention that failure to strictly comply with the requirements of publication is a jurisdictional defect which would render the ordinance invalid is not persuasive. The various authorities cited do not convince us that the true purpose of the statute was not achieved by substantial

compliance. KRS 67A.880 provides that the date of publication of the ordinance of determination begins the 30-day litigation period. The ordinance in question was adopted on May 29, 1980, and published on June 3, 1980. There is no indication that anyone was prejudiced by the substantial compliance with the publication requirements.

There was a proper finding by the council. A municipal legislative body which provides for the construction of public improvements is performing a legislative act. Here the council adopted a program for the construction of sewers that was generally applicable throughout four project areas. It acted in a law-making and policy-making role. It was not acting adjudicatively. The appellants cite no authority to support their proposition that a legislative decision to construct public improvements can be characterized as an adjudicative function.

The legislative action of any governing body is subject to very limited judicial review. The legislature is not governed by judicial

compliance. KRS 67A.880 provides that the date of publication of the ordinance of determination begins the 30-day litigation period. The ordinance in question was adopted on May 29, 1980, and published on June 3, 1980. There is no indication that anyone was prejudiced by the substantial compliance with the publication requirements.

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The legislative action of any governing body is subject to very limited judicial review. The legislature is not governed by judicial

standards in making findings of fact. McKinstry v. Wells, Ky. App., 548 S.W.2d 169 (1977). The legislature cannot be arbitrary or capricious. The construction of public improvements will not be disturbed unless there is an abuse of discretion or a showing of fraud or illegality. City of Tompkinsville v. Miller, 195 Ky. 143, 241 S.W. 809 (1922); Thomas v. City of Berea, Ky. App., 557 S.W.2d 214 (1977). Here the record amply demonstrates that the council made sufficient findings based on substantial information that the public health, safety and welfare required building the sanitary sewers. There is a well established rule of noninterference by the judiciary with the exercise of discretionary powers of municipal corporations. McQuillin, Municipal Corporations §10.37 (3rd Ed. Rev. 1979). "Courts are reluctant to and only in extreme cases will declare ordinances passed pursuant to legislative authority invalid on the ground that they are unreasonable, arbitrary or oppressive." City of Somerset v. Newton,

259 Ky. 195, 198, 82 S.W.2d 306 (1935).

The improvement benefit assessment formula was proper as used by the council. The appellants argue that neither the statute nor the assessment formula is constitutional because neither accounts for actual value conferred on individual property. A careful examination of the record indicates that there was no showing that the determination by the council was improper. Pursuant to the statutes the council adopted an improvement benefit assessment formula based on findings of fact that the benefited properties received substantially similar benefits.

Again the appropriate standard of review for legislative action is limited to whether the act in question is unreasonable or arbitrary. Moore v. Ward, Ky., 377 S.W.2d 881 (1964). Here there is a rational connection between the action and the purpose for which the government's power existed. The government's decision as to the benefits conferred upon the properties in the third-year

project and the improvement benefit assessments to be levied is supported by the various investigations, studies and other related information. There is no evidence in the record which indicates the properties would not be enhanced as a result of the new sewers.

It is well settled that a special assessment for public sewer improvements is not a "tax" but is an assessment which is to be made in an amount with reference to the benefit which the property derives from the cost of the project. Krumpelman v. Louisville & Jefferson County Sewer District, Ky., 314 S.W.2d 557 (1958). KRS 67A.873 provides that waste water collection projects may be assessed according to the assessed value basis. There is no basis for contending that the legislative action by city government is arbitrary because there is a rational connection between that action and the purpose for which the government was created. McDonald v. City of Louisville, Ky., 470 S.W.2d 173 (1971).

A municipal legislative judgment in relation to a public improvement project will be overturned only where it is shown that the action is so arbitrary and unwarranted as to result in confiscation. United States v. Carolene Products Co., 304 U.S. 144, 82 L.Ed. 1235, 58 S.Ct. 778 (1938).

The burden is on the person who challenges the action of the legislative body as being unreasonable and arbitrary to sustain that position where it does not appear on the face of the ordinance. Louisville & Jefferson County Metropolitan Sewer District v. Joseph E. Seagram & Sons, 307 Ky. 413, 211 S.W.2d 122 (1948). The record here does not indicate that the appellants have sustained their burden of proof. Balancing the arguments of the appellants and the appellees, it appears that the government made a significant effort to support its decision. The trial court was correct in its decision.

There was substantial evidence that the government's determination as to the appropriate assessment formula was proper

under KRS 67A.875(5). The appellants provided no evidence that the formula was improper either under the statute or as applied to their properties. The trial court's finding was correct.

When the council determines that all benefited properties will be affected in substantially the same way, the council may classify the properties into assessment zones based on similarity of benefits. This section of the law was the foundation of the assessment procedure used by the counsel (sic). There was testimony by various counsel (sic) members and the health commissioner that considerable study had gone into the adoption of the formula. The trial court found that the assessment procedure provided for twelve different zones and twelve different assessments. He also determined that there was sufficient data to determine that the benefited properties received substantially equal benefits and that no evidence of inequality was presented at trial as well as no evidence of fraud or illegality in the council's action.

Again judicial review of legislative action in arriving at improvement assessment formulas is very limited. The courts will interfere only where there is an abuse of discretion. City of Tompkinsville v. Miller, supra. We find no reason to disturb the findings of fact as made by the trial court.

The public hearing provided for affected property owners, protected their due process rights, and was constitutional. The assessment is not an unlawful taking of property in violation of the United States Constitution and the Kentucky Constitution. There is no requirement that the public hearing must be a "trial-type" hearing.

The fundamental requirement of due process is the opportunity to be heard at a meaningful time and manner. Matthews v. Eldridge, 424 U.S. 319, 47 L.Ed.2d 18, 96 S.Ct. 893 (1976). On March 31, 1980, a public hearing was held on this project at which several property owners spoke on the subject and on the matter of the estimated assessments. No exact figures as to the cost of the benefits

were presented because final bidding had not been made. All benefited property owners were given an opportunity to speak at the public hearing as required by statute. The scheduling of the public hearing prior to the determination of exact cost to be assessed does not invalidate the meeting. If a property owner is given an opportunity to be heard at sometime during the assessment proceedings before the liability of his property is fixed, due process is satisfied. Shaw v. City of Mayfield, 204 Ky. 618, 265 S.W. 13 (1924).

The failure of the protestants to persuade a majority of the council is not a violation of due process in and of itself. The ultimate council vote was 11-4 in favor of the third-year sewer project. Clearly they had the opportunity to present their views in a constitutional framework.

The contention that the improvement is a tax and therefore a trial-type hearing is necessary is without merit. The improvement benefit assessment is a special assessment

as distinguished from a tax. Krumpelman, supra. The improvement benefits assessment is based on the relationship to benefits conferred. Here the legislative body acted to investigate legislative facts and no trial-type hearing was required. The municipal legislative body did not act in an adjudicatory manner. A general program applicable to properties throughout the project area was established. The property of the appellants was not treated individually based on facts peculiar to each situation. There is no indication that the action of the council was arbitrary or that there was an absence of a rational connection between the action and the purpose of the act. The landowners did have an opportunity at a public hearing to be heard. The council's actions were lawful.

Council complied with the notice requirements of the act in connection with the public hearing. The trial judge correctly found that the mailing of individual notices to the property owners based on the

records of the property valuation administration office was the most practicable method under the circumstances to give reasonable actual notice. There is no showing that the appellants were prejudiced by the method of notice used. Accordingly, the publication requirements were satisfied.

The 30-day statute of limitations is constitutional and within the power of the General Assembly to enact. The statute provides that the landowner must file a civil action within 30 days of the publication of the ordinance of determination. Here the appellant's (sic) timely filed this lawsuit. The trial court was correct in holding that the 30-day litigation period is not an unreasonably short period of time and within the authority of the legislature to enact.

The so-called outside contracts entered into by the government with engineering and law firms were legal and validly executed. The appellants argue the statute mandates engineering contracts be entered into only after the ordinance is passed. There is no mandatory

requirement in KRS 67A.875 that the engineering contracts be authorized after the ordinance is passed. Any language requiring the engineering work to be done after the passage of the ordinance is directory and not mandatory. A statute is considered as directory if it relates to some immaterial matter of it is does not reach the substance of the thing, and if by the omission to observe it, the rights of those interested will not be prejudiced. Fannin v. Davis, Ky., 385 S.W.2d 321 (1964). The substance of the law is that in conjunction with initiating a waste-water collection project, the government is authorized to contract for preliminary plans, specifications and financial planning. An informed council decision to undertake this kind of project requires substantial preliminary information with regard to the area to be served and the related costs. The statute contains no mandatory language that consultants shall be retained only after the ordinance determining the need is passed. The evidence does not indicate any prejudice resulting from the

timing of the execution of the engineering contracts. Neither the contracts, nor the appropriation of funds therefor, was unlawful. In addition, the statute specifically permits the use of firms of engineers without regard to whether the government has its own staff engineers. Such costs are specifically included in the project and passed on to the property owners. KRS 67A.871(5) and 67A.882(2).

In regard to the outside attorney fees, the urban county government has authority to retain outside counsel for independent projects. A similar charter provision was endorsed in Purcell v. City of Lexington, 186 Ky. 381, 217 S.W. 599 (1920). In the absence of a specific statutory prohibition, a municipal corporation is generally permitted to contract with outside counsel. 56 Am. Jur. 2d Municipal Corporations Etc. § 219. Heninger v. City of Akron, Ohio, 112 N.E.2d 77 (1951); Moore v. City of Kokomo, Ind., 60 N.E.2d 530 (1945). The Lexington-Fayette Urban County Government charter provides that private counsel may be retained. Section 3.02 permits the government

to enter contracts with private persons with regard to the furnishing of services.

The circuit court correctly refused to allow this matter to be maintained as a class action. On October 14, 1980, an order was entered indicating that the government had requested a hearing on the class action aspects. Such a hearing was scheduled for November 14, 1980. The record does not indicate that evidence was introduced by the appellants to support their request. The trial court did not proceed as a class action but allowed the appellants to reapply for certification. This was not done.

The contention that the council did not study and evaluate the preliminary engineering and financing report is without merit. The evidence shows that the government did discuss and review the various reports at great length. There was no error of reversible consequence in the trial court's refusing to enjoin the project from proceeding.

It is the holding of this Court that the imposition of the special assessment for the

sanitary sewer project is valid and constitutional.

The judgment of the circuit court is affirmed.

Aker, Gant, Leibson, Stephenson and Wintersheimer, JJ., concur. Vance, J., dissents. Stephens, C.J., not sitting.

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SUPREME COURT OF KENTUCKY

82-SC-963-TG

RICHARD M. CONRAD,
ET AL. PLAINTIFFS

V. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE ARMAND ANGELUCCI, JUDGE
INDICTMENT NO. - 80-CI-1980

LEXINGTON-FAYETTE
URBAN COUNTY
GOVERNMENT, ET AL. DEFENDANTS

ORDER DENYING PETITION FOR REHEARING

Appellants' petition for rehearing is denied.

Aker, Gant, Leibson, Stephenson, Vance and Wintersheimer, JJ., sitting. All concur.

ENTERED November 23, 1983.

/S/ Robert F. Stephens
Chief Justice

KRS 67A.875. Determination of need by ordinance--Preliminary planning procedures--Ordinance of initiation.

"KRS 67A.875(6) The ordinance of initiation shall provide that a public hearing shall be held in respect of the proposed project at a time and place which shall be specified in the ordinance of initiation, and shall give notice that at the public hearing any owner of benefited property may appear and be heard as to whether the proposed project should be undertaken, whether the nature and scope of the project should be altered, and whether the project shall be financed through the assessment of benefited properties and issuance of bonds in respect of assessments not paid on a lump sum basis all as proposed by the ordinance of initiation and as authorized by KRS 67A.871 to 67A.894."

"KRS 67A.875(4) In all succeeding proceedings, the government shall be bound and limited by the ordinance of initiation with regard to the nature, scope and extent of the proposed wastewater collection project, but shall not be bound by or limited to the preliminary estimate of the costs of the proposed project. The costs of such project shall be determined upon the basis of construction bids publicly solicited by such urban-county government as required by KRS 67A.871 to 67A.894, and shall be binding upon the government and upon the owners of benefited properties, whether they turn out to be equal to, below, or above, such preliminary estimate of costs."

"KRS 67A.878. Public hearing.--A public hearing shall be held at the time and place designated in the ordinance of initiation. Any person qualifying under the provisions of KRS 67A.875(7) shall preside and conduct the hearing. The presiding officer shall cause reasonable notes or minutes of the proceedings to be made, and they shall be submitted in

writing to a subsequent regularly scheduled meeting of the urban-county council of the government. Any owner of property proposed to be benefited by the proposed wastewater collection project may appear and be heard at the public hearing either in person or by a duly authorized representative. Any such owner of benefited property may submit to the presiding officer or to the designated clerk a written instrument in which such owner of benefited property is identified by name, address and designation of benefited property, and containing a statement of any reason for advocating or objecting to any of the aspects of the proposed project, and such written instruments shall be attached to and included in the written report of the hearing. Whether or not any such written instruments are submitted, the presiding officer at the public hearing may require those in attendance to execute an attendance roster, to properly identify themselves as owners of benefited property or representatives of the owners, and may impose reasonable rules upon the conduct of the public hearing. The estimated costs of the project shall be disclosed at the public hearing, or, if construction bids for construction of the project have been received, the results of the bidding shall be disclosed. A report of local health agencies may be made a part of the public hearing, and the government may cause distribution of informative materials and summarizations of engineering and health reports to be carried out at the public hearing. The public hearing may be adjourned to convene again, and from time to time either at a time and place announced at the public hearing or upon public notice of the time and place to be given in any manner the government may determine."

"KRS 67A.880. Action by property owner for relief from ordinance or determination.--(1) Any owner of property to be benefited by the wastewater collection project may, within thirty (30) days after passage and

publication of the ordinance of determination:

(a) File an action in the circuit court of the county in which the urban-county government is situated seeking relief by declaratory judgment, injunction or otherwise; or

(b) File in the office of the clerk of the urban-county government a written statement of intent to file such an action endorsed by a licensed attorney at law to the effect that in his opinion his client has a reasonable and legitimate probable cause for such proposed litigation, in which event the time for filing the action shall be extended for fifteen (15) days after the date the statement is filed.

(2) In the event of the occurrence of either (a) or (b) above, all proceedings of the government with respect to the proposed wastewater collection project shall be abated until final judicial determination of the controversies presented thereby. In the absence of action by any owner of property proposed to be benefited as herein provided, the provisions of the ordinance of determination shall be final and binding. After the lapse of time as herein provided, all actions by owners of properties to be benefited shall be forever barred."

"KRS 67A.881. Action by council when ordinance of determination upheld.--If the ordinance of determination authorizes the undertaking of the project and the financing thereof according to the plan of financing enacted by the ordinance of initiation, and if owners of benefited properties do not institute action as permitted by KRS 67A.880, or if such action be taken and shall result in final judgment permitting the government to proceed according to the ordinance of initiation and the ordinance of determination, the urban-county council of the government may proceed to implement and finance the costs of construction of the project as authorized by KRS 67A.871 to 67A.894."

"KRS 67A.882. Bids--Apportionment of cost--Alternative payment methods and funding.--(1) Proposals for the construction of the project shall be solicited upon the basis of submission of sealed, competitive bids after advertisement by publication pursuant to KRS Chapter 424, following adoption of the ordinance of determination and expiration of the permissive litigation period, or alternatively, the conclusion of litigation in a manner favorable to the project.

(2) After all costs of the project have been determined upon the basis of the construction bidding, the costs shall be apportioned among the owners of benefited property pursuant to the method of assessment previously determined in the ordinance of initiation and the ordinance of determination. However, in determining the apportionment of individual costs for purposes of affording to the owners of benefited property the privilege of paying the assessment levies in full on a lump sum basis, the urban-county government shall exclude amounts required for the creation of the debt service reserve fund, capitalized interest costs, and any bond discount which the government may allow in connection with the sale of bonds to provide funds for the costs of construction not paid initially by the owners of benefited properties on a lump sum basis.

(3) The owners of benefited property shall be notified in writing of the exact amount levied against their individual properties, which amount may, at the option of each owner, be paid in full on a lump sum basis within thirty (30) days. Such owners shall be notified that in the event the costs of construction of the project exceed lump sum payments and bond proceeds, an additional apportionment of costs will be made and that all owners who paid the initial improvement benefit assessment on a lump sum basis must likewise pay the additional assessment on the same basis. The statement submitted to such owners of benefited property shall additionally

advise such owners that in the event such owners do not elect to pay the special improvement benefit assessment in full within the period of thirty (30) days from receipt, the urban-county government shall issue bonds pursuant to KRS 67A.871 to 67A.894 for the purpose of providing the cost of construction of the project, including the debt service reserve fund, if paid from bond proceeds, capitalized interest costs, any bond discount, together with all other costs, as the term is defined in KRS 67A.871(5). The owners of the benefited property shall further be advised that bonds and the interest thereon shall be amortized by annual improvement benefit assessment levies against all benefited properties which have not made lump sum payments in accordance with the method of apportionment provided by the ordinance of initiation and the ordinance of determination.

(4) At the conclusion of the thirty (30) day permissive lump sum payment period, the urban-county council shall determine the aggregate principal amount of improvement benefit assessments paid in full by owners of benefited property; shall order the deposit of the moneys in a trust account which shall be used solely to pay the costs of construction of the project; shall aggregate all unpaid improvement benefit assessments for purposes of determining the principal amount of bonds to be issued by the government to provide the costs of the project; shall compute the debt service reserve fund in respect to the bonds, if the fund is to be capitalized from bond proceeds; shall determine the bond discount and capitalized interest which shall be applicable to the issue of bonds; and shall proceed to complete the financing of the costs of construction of the project through the adoption of the ordinance of bond authorization as provided in KRS 67A.883 and the sale of bonds authorized pursuant thereto. Provided, however, that the ordinance of bond authorization may, as provided in KRS 67A.884, provide that, in lieu of issuing bonds, the government may contract with the Kentucky pollution abatement authority for the financing of the project, in which latter event all procedures with respect

to the annual assessment of benefited properties shall continue in full force and effect, but the urban-county government shall secure funding for the project through the Kentucky pollution abatement authority in lieu of issuing bonds and shall pledge to and pay to the authority the annual improvement benefit assessment levies and enforce them for the security of the financing.

ESTIMATED BENEFIT ASSESSMENT BY ZONE AND
FORMULA USED BY LEXINGTON-FAYETTE URBAN COUNTY GOVERNMENT
TO ASSIGN PROPERTIES TO ZONES

| ASSESSMENT ZONE | ESTIMATED SPECIAL BENEFIT ASSESSMENT | FRONT FOOTAGE | PVA ASSESSED VALUATIO |
|---|---|---|---|
| I | $2,026 | 0 to 30 ft. | 0 to $10,0 |
| II | $2,229 | 30+ to 40 ft. | $10,000+ to $15,0 |
| III | $2,452 | 40+ to 50 ft. | $15,000+ to $20,0 |
| IV | $2,697 | 50+ to 65 ft. | $20,000+ to $25,0 |
| V | $2,967 | 65+ to 80 ft. | $25,000+ to $30,0 |
| VI | $3,264 | 80+ to 95 ft. | $30,000+ to $35,0 |
| VII | $3,590 | 95+ to 110 ft. | $35,000+ to $40,0 |
| VIII | $3,949 | 110+ to 140 ft. | $40,000+ to $50,0 |
| IX | $4,344 | 140+ to 170 ft. | $50,000+ to $60,0 |
| X | $4,778 | 170+ to 260 ft. | $60,000+ to $90,0 |
| XI | $5,256 | 260+ to 350 ft. | $90,000+ to $120,0 |
| XII | $5,782 | over 350 ft. | over $120,000 |

IN THE SUPREME COURT OF THE
COMMONWEALTH OF KENTUCKY

RICHARD M. CONRAD, HELEN RICHARDSON, PAULA JEAN SYMPSON SMITH, RALPH J. RANSDELL, SR., HELEN M. PENA, CLIFFORD SCHLAUSKY, E. J. WAGNER and RICHARD C. COX — APPELLANTS

FILED: December 12, 1983

V.

NOTICE OF APPEAL UNDER RULE 10 OF THE RULES OF THE SUPREME COURT OF THE UNITED STATES

NO. 82-SC-963-TG

LEXINGTON-FAYETTE URBAN COUNTY GOVERNMENT; EDGAR WALLACE, JOHN WIGGINGTON, JOE JASPER, ANNE V. GABBARD, MARY C. McNEESE, J. H. COMBS, ELEANOR H. LEONARD, FRED BROWN, WILLIAM RICE, LAYMAN GINGER, PAUL ROSE, CAROL JACKSON, DONALD BLEVINS, ANN ROSS and JAMES TODD, MEMBERS OF THE LEXINGTON-FAYETTE URBAN COUNTY COUNCIL; JAMES G. AMATO, MAYOR OF THE LEXINGTON-FAYETTE URBAN COUNTY GOVERNMENT; LEXINGTON-FAYETTE COUNTY HEALTH DEPARTMENT, GORDON R. GARNER, COMMISSIONER OF PUBLIC WORKS OF THE LEXINGTON-FAYETTE URBAN COUNTY GOVERNMENT — APPELLEES

* * * * * * * * *

Notice is hereby given that Richard C. Cox, Ralph J. Ransdell, Sr. and Paula Jean Sympson Smith, three of the Appellants named above, hereby appeal to the Supreme Court of

the United States from the Final Judgment of the Supreme Court of Kentucky by the Opinion rendered August 31, 1983, and by Order denying Appellants' timely filed Petition for Rehearing, entered November 23, 1983, upholding the judgment of the Fayette Circuit Court, which upheld the validity of a state statute, to wit: KRS 67A.871 to 67A.894, particularly, but not limited to KRS 67A.875(4), 67A.875(6), KRS 67A.878 and KRS 67A.882, the validity of such statute having been drawn in question as being repugnant to the due process clause of the 14th Amendment to the Constitution of the United States of America, and such judgment here appealed from being in favor of validity.

This appeal is taken pursuant to Title 28 U.S.C. §1257(2); 28 U.S.C. §2101(c); and 28 U.S.C. §2403(b).

/S/ W. C. Jacobs
WILLIAM C. JACOBS
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(606) 255-2464

ATTORNEY FOR APPELLANTS

PROOF OF SERVICE

I, William C. Jacobs, a member of the Bar of the Supreme Court of the United States of America and attorney of record for Richard C. Cox, Ralph J. Ransdell, Sr., and Paula Jean Sympson Smith, Appellants herein, certify that on the 9th day of December, 1983 I served true copies of the foregoing Notice of Appeal to the Supreme Court of the United States on the Appellees, Lexington-Fayette Urban County Government; Edgar Wallace, John Wiggington, Joe Jasper, Anne V. Gabbard, Mary C. McNeese, J. H. Combs, Eleanor H. Leonard, Fred Brown, William Rice, Lyman Ginger, Paul Rose, Carol Jackson, Donald Blevins, Ann Ross and James Todd, Members of the Lexington-Fayette Urban County Council; James G. Amato, Mayor of the Lexington-Fayette Urban County Government; Lexington-Fayette County Health Department; Gordon R. Garner, Commissioner of Public Works of the Lexington-Fayette Urban County Government, by causing true copies thereof to be deposited in a United States post office, at Lexington, Kentucky,

with first-class postage prepaid, addressed to the respective counsels of record for such Appellees, at their respective post office addresses of such counsel, as hereinafter set forth, to wit: for Appellees Lexington-Fayette Urban County Government; Edgar Wallace, John Wiggington, Joe Jasper, Anne V. Gabbard, Mary C. McNeese, J. H. Combs, Eleanor H. Leonard, Fred Brown, William Rice, Lyman Ginger, Paul Rose, Carol Jackson, Donald Blevins, Ann Ross and James Todd, Members of the Lexington-Fayette Urban County Council; James G. Amato, Mayor of the Lexington-Fayette Urban County Government; and Gordon R. Garner, Commissioner of Public Works of the Lexington-Fayette Urban County Government by mailing same to their attorneys of record, Hon. Rena Gardner Wiseman and Hon. Barbara B. Edelman, Lexington-Fayette Urban County Government, Law Department, 200 East Main Street, Lexington, Kentucky 40507; for Appellee Lexington-Fayette County Health Department, by mailing same to its attorney of record, Hon. Phillip D. Scott,

Greenebaum, Doll & McDonald, P.O. Box 1808, Lexington, Kentucky 40503.

This Notice of Appeal is with respect to a proceeding wherein the constitutionality of a statute of a State, to wit: the Commonwealth of Kentucky, is drawn in question, and neither the State nor any agency, officer or employee thereof is a party hereto, that 28 U.S.C. §2403(b) may be applicable, and that by reason thereof a true copy hereof was served upon the Attorney General of the Commonwealth of Kentucky on the 9th day of December, 1983 by causing a true copy thereof to be deposited in a United States post office, at Lexington, Kentucky, with first-class postage prepaid to wit: Hon. Steven L. Beshear, Attorney General, State Capitol, Frankfort, Kentucky 40601.

During the pendency of this proceeding at the trial level before the Fayette Circuit Court, Lexington, Kentucky, it was certified to the Attorney General for the Commonwealth of Kentucky on the 19th day of September, 1980 that the constitutionality of the statute of

the Commonwealth of Kentucky mentioned in the within Notice of Appeal was drawn in question and that on the 7th day of October, 1980 the Attorney General of the Commonwealth of Kentucky filed herein his notice of intention not to intervene.

The undersigned certifies that a true copy of the within Notice of Appeal to the Supreme Court of the United States was served upon the clerk of the Fayette Circuit Court, such clerk being the clerk of the court possessed of the record herein, by causing a true copy thereof to be deposited in a United States post office, at Lexington, Kentucky, with first-class postage prepaid to wit: Robert M. True, Clerk, Fayette Circuit Court, Room 200, Courthouse, Lexington, Kentucky 40507.

The undersigned attorney for the Appellants (Richard C. Cox, Ralph J. Ransdell, Sr. and Paula Jean Sympson Smith) believes that the Appellants Richard M. Conrad, Helen Richardson, Helen M. Pena, Clifford Schlausky and E. J. Wagner have no interest in the outcome of this appeal. This is to certify that a true

copy hereof was served on Richard M. Conrad, c/o Conrad Chevrolet, Inc., 2800 Richmond Road, Lexington, Kentucky 40509, Helen Richardson, 616 North Addison Avenue, Lexington, Kentucky 40504, Helen M. Pena, 613 North Addison Avenue, Lexington, Kentucky 40504, Clifford Schlausky, 216 Zandale Drive, Lexington, Kentucky 40503, and E. J. Wagner, 3016 Shirlee Drive, Lexington, Kentucky 40502, by mailing same to the Appellants' respective post office addresses mentioned above by causing a true copy thereof to be deposited in a United States post office, at Lexington, Kentucky, with first-class postage prepaid.

The undersigned states that all parties required to be served are the parties named above, accompanied by the addresses of their respective counsel, and that all such parties have been served, as herein certified.

By affixing his signature hereto, the undersigned does thereby enter his appearance as attorney for Appellants herein.

/S/ W. C. Jacobs

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ATTORNEY FOR APPELLANTS

The foregoing Appendices are filed by Counsel, identified below, for the Appellants in conformity with Rule 15.1(j) and Rule 33.6 of the Rules of the Supreme Court.

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ENTRY OF APPEARANCE AND
PROOF OF SERVICE

I, William C. Jacobs, a member of the Bar of the Supreme Court of the United States of America, enter an appearance as attorney of record for the Appellants herein, Richard C. Cox, Ralph J. Ransdell, Sr., and Paula Jean Sympson Smith and certify on the 8th day of February, 1984 I served three (3) copies of the foregoing Jurisdictional Statement and Appendices by causing true copies hereof to be deposited in a United States post office, at Lexington, Kentucky, with first-class postage prepaid, addressed to the respective counsels of record for such Appellees, at their respective post office addresses of such counsel, as hereinafter set forth, to wit: for Appellees Lexington-Fayette Urban County Government; Edgar Wallace, John Wiggington, Joe Jasper, Anne V. Gabbard, Mary C. McNeese, J. H. Combs, Eleanor H. Leonard, Fred Brown, William Rice, Lyman Ginger, Paul Rose, Carol Jackson, Donald Blevins, Ann Ross and James Todd, Members of

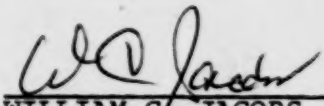
the Lexington-Fayette Urban County Council; James G. Amato, Mayor of the Lexington-Fayette Urban County Government; and Gordon R. Garner, Commissioner of Public Works of the Lexington-Fayette Urban County Government by mailing same to their attorneys of record, Hon. Rena Gardner Wiseman and Hon. Barbara B. Edelman, Lexington-Fayette Urban County Government, Law Department, 200 East Main Street, Lexington, Kentucky 40507; for Appellee Lexington-Fayette County Health Department, by mailing same to its attorney of record, Hon. Phillip D. Scott, Greenebaum, Doll & McDonald, P.O. Box 1808, Lexington, Kentucky 40503.

That on the 29th day of December, 1983, the Attorney General of the Commonwealth of Kentucky, by counsel, served his NOTICE OF INTENT NOT TO INTERVENE, acknowledging receipt of the Notice of Appeal under Rule 10 of the Rules of the Supreme Court of the United States filed by Appellants in the Supreme Court of Kentucky, informing the Court and the parties that the Attorney General did not intend to intervene.

The undersigned further certifies that a true copy hereof was served upon the Clerk of the Supreme Court of Kentucky, such clerk being the clerk of the court whose judgment is sought to be reviewed by causing a true copy hereof to be deposited in a United States post office, at Lexington, Kentucky, with first-class postage prepaid, addressed as follows to wit: Clerk, Kentucky Supreme Court, Room 209, Capitol Building, Frankfort, Kentucky 40601. Further the undersigned certifies that a true copy hereof was served upon the Clerk of the Fayette Circuit Court, such clerk being the clerk of the court possessed of the record herein, by causing a true copy hereof to be deposited in a United States post office, at Lexington, Kentucky, with first-class postage prepaid, addressed as follows to wit: Robert M. True, Clerk, Fayette Circuit Court, Room 200, Courthouse, Lexington, Kentucky 40507.

The undersigned states that all parties required to be served are the parties named above, accompanied by the addresses of their

respective counsel, and that all such parties have been served, as herein certified.



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NO. 83-1323

IN THE

# Supreme Court Of The United States

October Term, 1983

RICHARD C. COX, RALPH J. RANSDELL, SR., PAULA JEAN SYMPSON SMITH — APPELLANTS

V.

LEXINGTON-FAYETTE URBAN COUNTY GOVERNMENT; EDGAR WALLACE, JOHN WIGGINGTON, JOE JASPER, ANNE V. GABBARD, MARY C. McNEESE, J.H. COMBS, ELEANOR H. LEONARD, FRED BROWN, WILLIAM RICE, LYMAN GINGER, PAUL ROSE, CAROL JACKSON, DONALD BLEVINS, ANN ROSS and JAMES TODD, MEMBERS OF THE LEXINGTON-FAYETTE URBAN COUNTY COUNCIL; JAMES G. AMATO, MAYOR OF THE LEXINGTON-FAYETTE URBAN COUNTY GOVERNMENT; LEXINGTON-FAYETTE COUNTY HEALTH DEPARTMENT, GORDON R. GARNER, COMMISSIONER OF PUBLIC WORKS OF THE LEXINGTON-FAYETTE URBAN COUNTY GOVERNMENT — APPELLEES

ON APPEAL FROM THE
SUPREME COURT OF KENTUCKY

## MOTION TO DISMISS APPEAL OR IN THE ALTERNATIVE TO AFFIRM JUDGMENT

(Attorneys for Appellees Appear on Inside Front Cover)

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## MOTION TO DISMISS APPEAL OR, IN THE ALTERNATIVE, TO AFFIRM JUDGMENT

Pursuant to Rule 16, paragraphs 1(b) and 1(d) of the Rules of the Supreme Court of the United States, appellees move that this appeal be dismissed or, alternatively, that the judgment of the Supreme Court of Kentucky be affirmed, for the reasons set forth below.

## JURISDICTION

This is an appeal from the final judgment of the Supreme Court of Kentucky upholding the validity of a state statute which had been challenged as being repugnant to the due process clause of the fourteenth amendment to the Constitution of the United States. The opinion of the Supreme Court of Kentucky upholding the validity of the statute was rendered on August 31, 1983, and the judgment became final on November 23, 1983, when appellants' petition for rehearing was denied by the Supreme Court of Kentucky. The opinion of the Supreme Court of Kentucky is now officially reported as 659 S.W.2d 190 and is included as Appendix A to this Motion. The jurisdiction of this Court has been invoked under 28 U.S.C. 1257(2).

## STATUTES INVOLVED

The Kentucky statutes involved, KRS 67A.871 through 67A.894, are set out in full in Appendix B to this Motion.

## STATEMENT OF THE CASE

In 1976, the Kentucky General Assembly enacted legislation, codified as KRS 67A.871 through 67A.894, which authorized urban county governments to construct sewers, and which authorized and provided procedures for financing the construction projects undertaken. Thereafter, the Lexington-Fayette Urban County Government ("Urban County Government") instituted a series of sewer projects, financed as authorized by KRS 67A.871 through 67A.894.

In compliance with the provisions of KRS 67A.875(1), the legislative body of the Urban County Government, the Lexington-Fayette Urban County Council, initiated the "third year sewer project" on January 10, 1980, by passage of an ordinance determining that there was a need for the construction of the sewers in the area in question. On March 4, 1980, the ordinance of initiation required by KRS 67A.875(3) was passed. As required by KRS 67A.875(6), this ordinance ordered a public hearing at which owners of property in the proposed project area could appear and be heard as to whether the project should be undertaken, whether the nature and scope of the project should be altered, and whether the project should be financed through assessments on benefited properties and issuance of bonds. At the time of the hearing, which was held on March 31, 1980, estimated costs and assessment amounts were available.

Following the public hearing, the ordinance of determination required by KRS 67A.879 was enacted by the Lexington-Fayette Urban County Council. This ordinance determined that the project would be undertaken, set forth the nature and scope of the project, and established the methods by which the project was to be financed. These methods included assessments on benefited property, and a bond issue to be repaid by periodic payments from property owners who elected not to pay their assessments in a lump sum.

On June 30, 1980, certain property owners in the project area commenced the action now before this Court, challenging the proposed sewer project as permitted by KRS 67A.880, and the statutes which authorized the project. One question presented by the complaint was that which is before this Court, whether KRS 67A.875(6) violates the due process clause of the fourteenth amendment to the United States Constitution by failing to afford affected property owners a hearing on the exact amount of the improvement benefit assessments before the assessments are levied and become a lien against their respective properties. On August 16, 1982, the Fayette Circuit Court issued its findings of fact and conclusions of law, which were favorable to the project and upheld the constitutionality of the authorizing legislation. On September 3, 1982, final judgment was entered dismissing all forty-one counts of the property

owners' complaint, and authorizing the Urban County Government to proceed with the project.

The property owners appealed this judgment to the Court of Appeals of Kentucky, whereupon the government defendants moved to transfer the case to the Supreme Court of Kentucky. While this motion was pending, the government notified the property owners that the Urban County Government would immediately go forward with the challenged sewer construction project because the trial court judgment in the Fayette Circuit Court was the final judgment favorable to the project contemplated by KRS 67A.880(2) and 67A.881. The Supreme Court of Kentucky, the Court of Appeals of Kentucky, and Fayette Circuit Court were advised of the Urban County Government's intent to proceed with the sewer project by the by the governmental defendants' filing of an amended motion to transfer the appeal containing a statement of intent to proceed with the project pending appeal.

The property owners immediately filed a motion seeking abatement of all project proceedings pending their appeal. This motion was denied without comment by the Court of Appeals of Kentucky. Subsequently, the Supreme Court of Kentucky granted the government defendants' amended motion to transfer the appeal to that court.

On August 31, 1983 the Supreme Court of Kentucky issued an opinion, affirming the judgment

of the Fayette Circuit Court. It specifically held that the public hearing process protected the due process rights of property owners. The Court stated:

> The public hearing provided for affected property owners, protected their due process rights, and was constitutional. The assessment is not an unlawful taking of property in violation of the United States Constitution and the Kentucky Constitution. There is no requirement that the public hearing must be a "trial-type" hearing.
>
> The fundamental requirement of due process is the opportunity to be heard at a meaningful time and manner. *Mathews* v. *Eldridge*, 424 U.S. 319, 47 L.Ed.2d 18, 96 S.Ct. 893 (1976). On March 31, 1980, a public hearing was held on this project at which several property owners spoke on the subject and on the matter of the estimated assessments. No exact figures as to the cost of the benefits were presented because final bidding had not been made. All benefited property owners were given an opportunity to speak at the public hearing as required by statute. The scheduling of the public hearing prior to the determination of exact cost to the assessed does not invalidate the meeting. If a property owner is given an opportunity to be heard at some time during the assessment proceedings before the liability of his property is fixed, due process is satisfied. *Shaw* v. *City of Mayfield*, 204 Ky. 618, 265 S.W. 13 (1924).

*Conrad* v. *Lexington-Fayette Urban County Government*, Ky., 659 S.W.2d 190, 197 (1983). The property

owners filed a petition for rehearing before the Supreme Court of Kentucky which was denied. On December 12, 1983, this appeal was filed by three of the original property owner plaintiffs.

## ARGUMENT

The Appeal herein fails to present a substantial federal question because the decision of the Supreme Court of Kentucky followed long established precedent of the United States Supreme Court. Accordingly, the appeal should be dismissed, *Levering & Garrigues Co.* v. *Morrin*, 53 S.Ct. 549, 289 U.S. 103, 77 L.Ed. 1062 (1933), or the decision of the Supreme Court of Kentucky affirmed summarily.

Although appellants have stated the question on appeal as being whether KRS 67A.875(6) violates the due process clause, the Supreme Court of Kentucky actually did not speak in terms of that provision alone when it held that "the public hearing provided for affected property owners" was constitutional and protected due process rights. The public hearing is also the subject of KRS 67A.875(7), KRS 67A.876, and particularly KRS 67A.878, which sets forth in detail what is to happen at the hearing. Presumably, the Supreme Court of Kentucky considered all of these provisions in its holding.

In support of their claim that the public hearing provisions of KRS 67A.871 through 67A.894 are repugnant to the due process clause of the fourteenth

amendment to the United States Constitution, appellants cite the rule enunciated by this Court in *Londoner* v. *Denver*, 210 U.S. 373, 52 L.Ed. 1103, 28 S.Ct. 708, 714 (1907). This rule does not support their claim, however, because it applies only where the legislature, instead of itself fixing the specific amount of the assessment against each property owner, delegates that task to a subordinate, administrative body. Accordingly, this Court has stated:

> [W]hether a property-owner is entitled to be heard in advance upon the questions of benefit and apportionment depends upon the authority under which the assessment is made. When the assessment is made in accordance with a fixed rule adopted by a legislative act, the property-owner is not entitled to be heard in advance on the question of the amount and extent of the assessment and the benefits conferred.

*Withnell* v. *Ruecking Construction Co.*, 249 U.S. 63, 63 L.Ed. 479, 39 S.Ct. 200, 201 (1919).

This rule applies not only in the case of assessments enacted directly by a state legislature but also, as in this case, when an assessment has been enacted by a municipal legislative body which has been granted full legislative power over the subject matter by the state. *Browning* v. *Hooper*, 269 U.S. 396, 70 L.Ed. 300, 46 S.Ct. 141, 143 (1926); *Cheseboro* v. *Los Angeles County Flood Control District*, 306 U.S. 459, 83 L.Ed. 921, 59 S.Ct 622, 624 (1939).

Due process of law does not require a hearing in every possible case of government impairment of a private interest. There is no inflexible procedure which is applicable to every conceivable situation. *Stanley* v. *Illinois*, 405 U.S. 645, 31 L.Ed. 551, 92 S.Ct. 1208, 1212 (1972). In deciding what process is constitutionally due in various contexts, this Court has emphasized that procedural due process rules are shaped by the risk of error inherent in the truth-finding process, *Carey* v. *Piphus*, 435 U.S. 247, 55 L.Ed. 252, 98 S.Ct. 1042, 1050 (1978) in order to avoid mistakes and minimize unfair deprivations of life, liberty, or, as here, property.

This Court has always felt that the risk of error in the legislative process is minimal and that therefore no process is constitutionally necessary to avoid mistaken deprivations of property as a result of the legislative process. *French* v. *Barber Asphalt Paving Co.*, 181 U.S. 324, 45 L.Ed. 879, 21 S.Ct. 625, 630 (1901). Further, the action of a body having authority to apportion a burden of assessment in arriving at the amount, while it may be inequitable and unequal, is "far from rising to the level of a constitutional problem, and far from a case of taking property without due process of law." *Fallbrook Irrigation District* v. *Bradley*, 164 U.S. 112, 41 L.Ed. 369, 17 S.Ct. 56, 70 (1896).

In *King* v. *Portland*, 184 U.S. 61, 46 L.Ed. 431, 22 S.Ct. 290 (1901) this Court approved an improvement

assessment procedure, where, as in this case, the hearing provided for affected property owners was conducted at a time when only the estimated cost of the improvement was known. The Court stated:

> The taxing district being formed upon a consideration of the utility of the work proposed, and the benefits to the property owners, and the cost of the work and its apportionment, *the amount of the assessment then followed as a certain deduction*, and the property owner having notice of all proceedings and the right to contest them, it would seem useless to give him a further right to contest the assessment. [Emphasis added.]

*King* v. *Portland*, 22 S.Ct. at 293. The *King* Court further stated that any number of options would suffice to satisfy the very minimal process to which a property owner might be entitled concerning the specific figure of the assessment. Among these options is the ability to make the property owner a party to a collection suit at which he can challenge the amount of the assessment before he loses his property. If this is possible, then the property owner cannot be heard to complain that his property is being taken without due process of law *Id: see also, Embree* v. *Kansas City & L.B. Road District*, 240 U.S. 242, 60 L.Ed. 624, 36 S.Ct. 317, 320 (1915).

In this case, the provisions of KRS 67A.871 through 67A.894 have made the assessment figure "a certain deduction" as in *King*. KRS 67A.888 and KRS

67A.889 enable a property owner to challenge a specific assessment amount before he loses his property. All necessary due process requirements have been met by KRS 67A.871 through 67A.894.

## CONCLUSION

For the foregoing reasons, appellees move that this appeal be dismissed, or in the alternative, that the judgment of the Supreme Court of Kentucky be affirmed.

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# APPENDIX

SUPREME COURT OF KENTUCKY

82-SC-963-TG

RENDERED: Aug. 31, 1983
*To Be Published*

FINAL DATE *NOV 23, 1983*
*/S/ Rose Tomlinson* D.C.

RICHARD M. CONRAD, HELEN RICHARDSON, PAULA JEAN SYMPSON SMITH, RALPH J. RANSDELL, SR., HELEN M. PENA, CLIFFORD SCHLAUSKY, E.J. WAGNER and RICHARD C. COX — APPELLANTS

APPEAL FROM FAYETTE CIRCUIT COURT
V. HON. ARMAND ANGELUCCI, JUDGE
CIVIL ACTION NO. 80-CI-1980

LEXINGTON-FAYETTE URBAN COUNTY GOVERNMENT; EDGAR WALLACE, JOHN WIGGINGTON, JOE JASPER, ANNE V. GABBARD, MARY C. McNEESE, J. H. COMBS, ELEANOR H. LEONARD, FRED BROWN, WILLIAM RICE, LYMAN GINGER, PAUL ROSE, CAROL JACKSON, DONALD BLEVINS, ANN ROSS and JAMES TODD, MEMBERS OF THE LEXINGTON-FAYETTE URBAN COUNTY COUNCIL; JAMES G. AMATO, MAYOR OF THE LEXINGTON-FAYETTE COUNTY GOVERNMENT; LEXINGTON-FAYETTE

COUNTY HEALTH DEPARTMENT,
GORDON R. GARNER, COMMISSIONER
OF PUBLIC WORKS OF THE LEXINGTON-
FAYETTE URBAN COUNTY
GOVERNMENT APPELLEES

OPINION OF THE COURT
BY JUSTICE WINTERSHEIMER

**AFFIRMING**

* * * * * * *

This appeal is from a judgment entered September 3, 1982, which determined that the Lexington-Fayette Urban County Government may proceed with a sanitary project because it complied with the provisions of the sanitary sewer act. Various property owners sought declaratory and injunctive relief challenging the proposed imposition of the special sewer assessment as unconstitutional.

The principal question presented is whether KRS 67A.871 is special legislation and therefore unconstitutional. Other issues raised are whether the government was required to strictly comply with the publication statutes, whether the council was required to set out adjudicative facts in support of the ordinance of initiation, whether the improvement benefit assessment formula was constitutional, and whether it was properly based on assessed value pursuant to statute, whether the government complied with the due process hearing requirements in connec-

tion with the public hearing, whether the government failed to comply with the actual notice requirements of the act in relation to the public hearing, whether the 30-day litigation period is unreasonable because it accrues before the actual cost of the project is known, whether the outside contracts entered into by the government with engineering and legal firms are void, whether the circuit court properly refused to allow this action to be maintained as a class action, and whether it was error to refuse to enjoin the project from proceeding.

This Court affirms the judgment of the circuit court because the statute is constitutional and the method of assessment valid.

The General Assembly was within its constitutional authority to provide authorization for urban county governments to construct and maintain waste water collection projects. Such authority is merely a logical extension of the legitimate power of any municipal government.

The project in question is known as the "third-year sewer project" and encompasses eight neighborhoods in Lexington-Fayette County, involving 1,657 parcels of property. In the original complaint, the appellants alleged 41 counts. On appeal, they present twelve arguments. A four-day trial was conducted beginning January 18, 1982, before the circuit judge without a jury. The evidence consisted principally of each property owner testifying and most of

the city council members as well as various government engineers and employees, the Commissioner of Health and a real estate appraiser. The government presented proof in support of their decision to establish the sewer project, and the property owners testified that they did not want, nor believe that they really needed sewers. Judgment was entered on September 3, 1982, and the appeal of the property owners was transferred to this Court on March 30, 1983.

The Urban County Government statute, KRS 67A.871 through 67A.894, is not special legislation and does not violate Section 59 or Section 60 or Section 156 of the Kentucky Constitution. The classification of urban county government by the legislature has been found to be a reasonable classification. *Holsclaw* v. *Stephens*, Ky., 507 S.W.2d 462 (1974). The fact that there is presently only one urban county government does not mean that the law is unconstitutional. *City of Louisville* v. *Klusmeyer*, Ky., 324 S.W.2d 831 (1959). The Urban County Sewer Act is an appropriate classification and bears a reasonable relation to the purpose of the act. Such a government is authorized to plan, develop, initiate and finance waste water collection projects. KRS 67A.872. The testimony of a former mayor explains the purpose of the act and provides a basis for the finding by the circuit judge. Where a merged government is established, it is necessary to have an equitable means of extending sanitary sewers to older neighborhoods in

former county areas. The act created a reasonable method of extending sewers and fairly assessing the costs of construction.

The appellants' argument that the act does not cover second-class cities with sewage problems is unconvincing. Those cities do not present the same situation as an urban county government because the areas of their jurisdiction do not encompass unsewered county territory. The act cannot be considered special legislation because the classification is not as broad as it could have been drawn. *Commonwealth, ex rel Hancock* v. *Davis,* Ky., 521 S.W.2d 823 (1975).

*United Dry Forces* v. *Lewis,* Ky., 619 S.W.2d 489 (1981), is distinguishable because the court found that a statutory proceeding authorizing wet/dry elections did not refer to the stated purpose of the statute and therefore did not reasonably relate to its purpose. Here, the law did relate to the legislative purpose of the act. Even considering *United Dry Forces,* supra, the act is not special legislation.

Additionally, legislative action is generally presumed to be constitutional. *Holzclaw (sic)* v. *Stephens, supra. Folks* v. *Barren County,* Ky., 313 Ky. 515, 232 S.W.2d 1010 (1950). At trial, there was no evidence or substantial argument to overcome the presumption of constitutionality which must be accorded the act. Here there is a reasonable relation between the classification of urban county govern-

ment and the purpose of the act. The circuit court is affirmed.

The failure of the government with regard to KRS 424.120(1)(b), is not reversible error. There was compliance with the law requiring publication. The circuit court determined that publication in the *Lexington Leader*, which is owned and published by the same corporaton that owns and publishes the *Lexington Herald*, was sufficient. Actually the *Herald* has a larger circulation than the *Leader*. The Court determined that the project received widespread publicity. All communication to the government's clerk had indicated that the *Leader* had the largest circulation. Furthermore, individual notices were mailed to the property owners advising them of the public hearing. There was no showing of any prejudice as a result of the erroneous selection of a newspaper.

The government believed that the *Leader* was the newspaper with the largest bona fide circulation because the previous written and oral communications from the publishing company had so indicated. In addition, the employee of the *Lexington-Herald Leader* company in charge of advising customers as to circulation figures for the purpose of running legal notices assumed the *Leader* to be the proper newspaper in which to publish legal notices. Prior to this lawsuit, all legal notices of the Board of Education, Lex Tran, Board of Health, airport board and the planning commission were published in the *Leader*.

The *Leader* did have the highest circulation until after March 1977. It was not until September 1980, that the government was informed of the change in circulation leadership.

Substantial compliance in regard to publication requirements has been authorized in *Queenan* v. *City of Louisville*, Ky., 233 S.W.2d 1010 (1950). The purpose of the statute is to allow the public an ample opportunity to become sufficiently informed on the public question involved. Substantial compliance was also affirmed in *Lyon* v. *County of Warren*, Ky., 325 S.W.2d 302 (1959). There the court considered the widespread publicity relating to the bond issue and a large voter turnout. Here there was considerable publicity about the initiation of the sewer project by means of radio, television as well as newspaper coverage. Consequently, the purpose of the statutory requirements of notification by publication was achieved. The trial judge was correct in determining that substantial compliance had been achieved.

It should be noted that the appellants in raising the question of inadequate notification are the very persons who have initiated the lawsuit, indicating that they were not denied notification. The appellant's contention that failure to strictly comply with the requirements of publication is a jurisdictional defect which would render the ordinance invalid is not persuasive. The various authorities cited do not convince us that the true purpose of the statute was not

achieved by substantial compliance. KRS 67A.880 provides that the date of publication of the ordinance of determination begins the 30-day litigation period. The ordinance in question was adopted on May 29, 1980, and published on June 3, 1980. There is no indication that anyone was prejudiced by the substantial compliance with the publication requirements.

There was a proper finding by the council. A municipal legislative body which provides for the construction of public improvements is performing a legislative act. Here the council adopted a program for the construction of sewers that was generally applicable throughout four project areas. It acted in a law-making and policy-making role. It was not acting adjudicatively. The appellants cite no authority to support their proposition that a legislative decision to construct public improvements can be characterized as an adjudicative function.

The legislative action of any governing body is subject to very limited judicial review. The legislature is not governed by judicial standards in making findings of fact. *McKinstry* v. *Wells*, Ky. App., 548 S.W.2d 169 (1977). The legislature cannot be arbitrary or capricious. The construction of public improvements will not be disturbed unless there is an abuse of discretion or a showing of fraud or illegality. *City of Tompkinsville* v. *Miller*, 195 Ky. 143, 241 S.W. 809 (1922); *Thomas* v. *City of Berea*, Ky. App., 557 S.W.2d 214 (1977). Here the record amply

demonstrates that the council made sufficient findings based on substantial information that the public health, safety and welfare required building the sanitary sewers. There is a well established rule of noninterference by the judiciary with the exercise of discretionary powers of municipal corporations. McQuillin, *Municipal Corporations* §10.37 (3rd Ed. Rev. 1979). "Courts are reluctant to and only in extreme cases will declare ordinances passed pursuant to legislative authority invalid on the ground that they are unreasonable, arbitrary or oppressive." *City of Somerset* v. *Newton*, 259 Ky. 195, 198, 82 S.W.2d 306 (1935).

The improvement benefit assessment formula was proper as used by the council. The appellants argue that neither the statute nor the assessment formula is constitutional because neither accounts for actual value conferred on individual property. A careful examination of the record indicates that there was no showing that the determination by the council was improper. Pursuant to the statutes the council adopted an improvement benefit assessment formula based on findings of fact that the benefited properties received substantially similar benefits.

Again the appropriate standard of review for legislative action is limited to whether the act in question is unreasonable or arbitrary. *Moore* v. *Ward*, Ky., 377 S.W.2d 881 (1964). Here there is a rational connection between the action and the purpose for which the

government's power existed. The government's decision as to the benefits conferred upon the properties in the third-year project and the improvement benefit assessments to be levied is supported by the various investigations, studies and other related information. There is no evidence in the record which indicates the properties would not be enhanced as a result of the new sewers.

It is well settled that a special assessment for public sewer improvements is not a "tax" but is an assessment which is to be made in an amount with reference to the benefit which the property derives from the cost of the project. *Krumpelman* v. *Louisville & Jefferson County Sewer District*, Ky., 314 S.W.2d 557 (1958). KRS 67A.873 provides that waste water collection projects may be assessed according to the assessed value basis. There is no basis for contending that the legislative action by city government is arbitrary because there is a rational connection between that action and the purpose for which the government was created. *McDonald* v. *City of Louisville*, Ky., 470 S.W.2d 173 (1971).

A municipal legislative judgment in relation to a public improvement project will be overturned only where it is shown that the action is so arbitrary and unwarranted as to result in confiscation. *United States* v. *Carolene Products Co.*, 304 U.S. 144, 82 L.Ed. 1235, 58 S.Ct. 778 (1938).

The burden is on the person who challenges the action of the legislative body as being unreasonable and arbitrary to sustain that position where it does not appear on the face of the ordinance. *Louisville & Jefferson County Metropolitan Sewer District* v. *Joseph E. Seagram & Sons*, 307 Ky. 413, 211 S.W.2d 122 (1948). The record here does not indicate that the appellants have sustained their burden of proof. Balancing the arguments of the appellants and the appellees, it appears that the government made a significant effort to support its decision. The trial court was correct in its decision.

There was substantial evidence that the government's determination as to the appropriate assessment formula was proper under KRS 67A.875(5). The appellants provided no evidence that the formula was improper either under the statute or as applied to their properties. The trial court's finding was correct.

When the council determines that all benefited properties will be affected in substantially the same way, the council may classify the properties into assessment zones based on similarity of benefits. This section of the law was the foundation of the assessment procedure used by the council. There was testimony by various council members and the health commissioner that considerable study had gone into the adoption of the formula. The trial court found that the assessment procedure provided for twelve different zones and twelve different assessments. He

also determined that there was sufficient data to determine that the benefited properties received substantially equal benefits and that no evidence of inequality was presented at trial as well as no evidence of fraud or illegality in the council's action.

Again judicial review of legislative action in arriving at improvement assessment formulas is very limited. The courts will interfere only where there is an abuse of discretion. *City of Tompkinsville* v. *Miller, supra.* We find no reason to disturb the findings of fact as made by trial court.

The public hearing provided for affected property owners, protected their due process rights, and was constitutional. The assessment is not an unlawful taking of property in violation of the United States Constitution and the Kentucky Constitution. There is no requirement that the public hearing must be a "trial-type" hearing.

The fundamental requirement of due process is the opportunity to be heard at a meaningful time and manner. *Mathews* v. *Eldridge,* 424 U.S. 319, 47 L.Ed.2d 18, 96 S.Ct. 893 (1976). On March 31, 1980, a public hearing was held on this project at which several property owners spoke on the subject and on the matter of the estimated assessments. No exact figures as to the cost of the benefits were presented because final bidding had not been made. All benefited property owners were given an opportunity

to speak at the public hearing as required by statute. The scheduling of the public hearing prior to the determination of exact cost to be assessed does not invalidate the meeting. If a property owner is given an opportunity to be heard at some time during the assessment proceedings before the liability of his property is fixed, due process is satisfied. *Shaw v. City of Mayfield*, 204 Ky. 618, 265 S.W. 13 (1924).

The failure of the protestants to persuade a majority of the council is not a violation of due process in and of itself. The ultimate council vote was 11-4 in favor of the third-year sewer project. Clearly they had the opportunity to present their views in a constitutional framework.

The contention that the improvement is a tax and therefore a trial-type hearing is necessary is without merit. The improvement benefit assessment is a special assessment as distinguished from a tax. *Krumpelman, supra.* The improvement benefits assessment is based on the relationship to benefits conferred. Here the legislative body acted to investigate legislative facts and no trial-type hearing was required. The municipal legislative body did not act in an adjudicatory manner. A general program applicable to properties throughout the project area was established. The property of the appellants was not treated individually based on facts peculiar to each situation. There is no indication that the action of the council was arbitrary or that there was an absence of a

rational connection between the action and the purpose of the act. The landowners did have an opportunity at a public hearing to be heard. The council's actions were lawful.

Council complied with the notice requirements of the act in connection with the public hearing. The trial judge correctly found that the mailing of individual notices to the property owners based on the records of the property valuation administration office was the most practicable method under the circumstances to give reasonable actual notice. There is no showing that the appellants were prejudiced by the method of notice used. Accordingly, the publication requirements were satisfied.

The 30-day statute of limitations is constitutional and within the power of the General Assembly to enact. The statute provides that the landowner must file a civil action within 30 days of the publication of the ordinance of determination. Here the appellants' timely filed this lawsuit. The trial court was correct in holding that the 30-day litigation period is not an unreasonably short period of time and within the authority of the legislature to enact.

The so-called outside contracts entered into by the government with engineering and law firms were legal and validly executed. The appellants argue the statute mandates engineering contracts be entered into only after the ordinance is passed. There is no mandatory requirement in KRS 67A.875 that the

engineering contracts be authorized after the ordinance is passed. Any language requiring the engineering work to be done after the passage of the ordinance is directory and not mandatory. A statute is considered as directory if it relates to some immaterial matter of it is does not reach the substance of the thing, and if by the omission to observe it, the rights of those interested will not be prejudiced. *Fannin* v. *Davis*, Ky., 385 S.W.2d 321 (1964). The substance of the law is that in conjunction with initiating a waste-water collection project, the government is authorized to contract for preliminary plans, specification and financial planning. An informed council decision to undertake this kind of project requires substantial preliminary information with regard to the area to be served and the related costs. The statute contains no mandatory language that consultants shall be retained only after the ordinance determining the need is passed. The evidence does not indicate any prejudice resulting from the timing of the execution of the engineering contracts. Neither the contracts, nor the appropriation of funds therefor, was unlawful. In addition, the statute specifically permits the use of firms of engineers without regard to whether the government has its own staff engineers. Such costs are specifically included in the project and passed on to the property owners. KRS 67A.871(5) and 67A.882(2).

In regard to the outside attorney fees, the urban county government has authority to retain outside

counsel for independent projects. A similar charter provision was endorsed in *Purcell* v. *City of Lexington*, 186 Ky. 381, 217 S.W. 599 (1920). In the absence of a specific statutory prohibition, a municipal corporation is generally permitted to contract with outside counsel. 56 Am. Jur. 2d *Municipal Corporations Etc.* § 219. *Heninger* v. *City of Akron*, Ohio App., 112 N.E.2d 77 (1951); *Moore* v. *City of Kokomo*, Ind., 60 N.E.2d 530 (1945). The Lexington-Fayette Urban County Government charter provides that private counsel may be retained. Section 3.02 permits the government to enter contracts with private persons with regard to the furnishing of services.

The circuit court correctly refused to allow this matter to be maintained as a class action. On October 14, 1980, an order was entered indicating that the government had requested a hearing on the class action aspects. Such a hearing was scheduled for November 14, 1980. The record does not indicate that evidence was introduced by the appellants to support their request. The trial court did not proceed as a class action but allowed the appellants to reapply for certification. This was not done.

The contention that the council did not study and evaluate the preliminary engineering and financing report is without merit. The evidence shows that the government did discuss and review the various reports at great length. There was no error of reversible consequence in the trial court's refusing to enjoin the project from proceeding.

It is the holding of this Court that the imposition of the special assessment for the sanitary sewer project is valid and constitutional.

The judgment of the circuit court is affirmed.

Aker, Gant, Leibson, Stephenson and Wintersheimer, JJ., concur. Vance, J., dissents. Stephens, C.J., not sitting.

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SANITARY SEWERS

**67A.871. Definitions for KRS 67A.872 to 67A.894.**—As used in KRS 67A.872 to 67A.894, the following words or terms shall have the respective meanings indicated, unless a different meaning is clearly indicated by the context:

(1) "Assessed value basis" means the plan for the levying of improvement benefit assessments upon benefited property for benefits conferred by construction of projects on the basis of the assessed values (land only) of the benefited property, whether such levies are paid in full by benefited property owners or levied annually to amortize bonds. Such plan shall also include the levying of identical improvement benefit assessments upon classified zones of benefited property where determination is made by ordinance of an urban-county government, as provided in KRS 67A.872 to 67A.894, that benefits conferred by construction of a project are substantially equal and that the assessed value (land only) of all benefited property or designated zones thereof shall therefore be deemed equal in respect of a given wastewater collection project.

(2) "Benefited property, and property to be benefited" mean the property (land only) proposed to be benefited by construction of a wastewater collection project instituted by an urban-county government for the payment of the costs of which improve-

ment benefit assessments are to be levied against and collected from such benefited property.

(3) "Bonds" mean improvement lien bonds authorized and issued by urban-county governments pursuant to authority of KRS 67A.872 to 67A.894 for the purpose of providing costs for the construction of wastewater collection projects.

(4) "Construction" means and includes, the following services and facilities provided by an urban-county government:

(a) Preliminary planning to determine the economic and engineering feasibility of construction of wastewater collection projects, any engineering, architectural, legal, fiscal and economic investigations and studies necessary thereto, and all necessary surveys, designs, plans, working drawings, specifications, procedures and other required actions incident to the construction of wastewater collection projects;

(b) The building, acquisition, installation, erection, alteration, remodeling, improvements, expansion or extension of wastewater collection projects, and any other physical devices or appurtenances in connection with, or reasonably attendant to, such projects;

(c) The provision or making available sewer collection services to benefited property by providing sewer facilities to such benefited property although not directly financed by the issuance of bonds: and

(d) Inspection and supervision incident to the acquisition, construction and installation of wastewater collection projects.

(5) "Costs" as such term shall be applied to any wastewater collection project undertaken under KRS 67A.872 to 67A.894 includes the cost of labor, materials and equipment necessary to acquire, install and complete the project in a satisfactory manner, cost of land acquired, and every expense connected with the project, including construction costs, preliminary and other surveys, financial planning, inspections of the work as construction progresses, engineers' fees and costs, preparation of plans and specifications, publication of ordinances and notices, interest which will accrue on the bonds until the due date of the first annual improvement assessment levied in connection therewith, capitalized interest on the bonds for a period not to exceed three (3) years, a sum equal to any discount in the sale of the bonds (if discount bids are authorized and permitted by the issuing government), all or any portion of the debt service reserve requirement, if determination is made to finance them from bond proceeds, a reasonable allowance for unforseen contingencies, the printing of bonds and other costs of financing, including payment of attorneys' fees, underwriting and fiscal agency fees, trustees' fees, rating service fees and costs of issuance of bonds.

(6) "Debt service reserve requirement" means, with respect to any particular issue of bonds, the maximum annual requirements for payment of principal of and interest on the bond issue, which debt service reserve requirement shall be either funded in whole or in part by application of bond proceeds, or accrued in due course by the levying of improvement benefit assessments as provided in KRS 67A.872 to 67A.894.

(7) "Government or urban-county government" means an urban-county government which has been duly created and established pursuant to the provisions of this chapter.

(8) "Ordinance" means a formal and binding enactment of the urban-county council of an urban-county government entered in connection with the financing by such government of a wastewater collection project.

(9) "Public ways" shall include streets, boulevards, avenues, roads, lanes, alleys, parkways, courts, terraces and other courses of travel open to the general public by whatsoever name designated.

(10) "Wastewater" means any water or liquid substance containing sewage, industrial waste or other pollutants or contaminants derived from the prior use of such water or liquid substance.

(11) "Wastewater collection project or projects" means all or any part of any facilities, devices, objects and systems used and useful in the collection, holding

or transmission of wastewater from a benefited property to wastewater treatment plants or other similar facilities for final disposition thereof. Such terms shall include, without limiting the generality of the foregoing, sanitary sewage collection lines, intercepting sewers, outfall sewers, sewer laterals, power stations and pumping stations, and other equipment and their appurtenances necessary to enable the project to fulfill its function, including land acquisition, whether such project facilities are provided by funds derived from issuance of bonds or otherwise provided by a government in any manner.

**67A.872. Authorization to construct and maintain wastewater collection projects.**—The general assembly of the commonwealth of Kentucky finds and determines as a fact that in urbanized areas of the commonwealth, where industrialization and commercialization have progressed at a high rate, attended by rapid residential development, there is a particular public need for acquisition of major wastewater collection projects in the interests of the health, safety and welfare of the general public residing in such areas and in order to enable metropolitan population centers to plan and develop major community-wide sewer facilities; that it is therefore essential that urban-county governments be vested with alternative authority for the construction and installation of facilities for the collection of flowable liquid wastes generated by residential, commercial and industrial

uses for ultimate disposition in a proper manner at a cost of benefited properties; and that such urban-county governments be authorized and empowered to directly plan, develop, initiate, finance and carry out wastewater collection projects.

**67A.873. Alternative or additional authority.**—Urban-county governments created pursuant to this chapter are authorized to provide for, construct and finance wastewater collection projects according to the financing plan set forth in KRS 67A.871 to 67A.894. The authority hereby conferred upon urban-county governments is not intended, nor shall it be construed, to be in derogation or substitution of any authority otherwise conferred upon any urban-county government, but is alternative and in addition thereto. If any urban-county government has undertaken any proceedings under any other law to acquire a project, it may abandon such proceedings and proceed under the provisions of KRS 67A.871 to 67A.894. It is the purpose of KRS 67A.871 to 67A.894 to extend permissive authority to urban-county government to finance wastewater collection projects according to the assessed value basis, whereby benefited properties shall be assessed the cost of such projects according to benefits conferred upon the properties.

**67A.874. Authority is exclusive.**—In undertaking the planning, design, institution, authorization and financing of wastewater collection projects under

KRS 67A.871 to 67A.894, urban-county governments shall be vested within exclusive authority to plan, design, initiate, finance and carry out construction of such projects solely according to the requirements and procedures of KRS 67A.871 to 67A.894, without the necessity of securing approvals, ratifications or other consents from any other municipal corporation or the county encompassing any such government or in which any such government is situated.

**67A.875. Determination of need by ordinance — Preliminary planning procedures — Ordinance of initiation.** — (1) Any urban-county government which determines that the public health, safety and general welfare requires construction of a wastewater collection project and which proposes to undertake, authorize, construct and finance a wastewater collection project pursuant to KRS 67A.871 to 67A.894 shall, by appropriate ordinance of its urban-county council make such determinations and cause preliminary plans, designs, specifications and financial planning for such project to be prepared by one or more engineers, or one or more firms of engineers, licensed to do business in the Commonwealth of Kentucky. Alternatively, such preliminary procedures may be accomplished directly by duly qualified government personnel. A preliminary engineering and financing report shall be prepared in writing by such engineers for submission to the government.

(2) The preliminary engineering and financing report shall designate a geographical area in which a

wastewater collection project is recommended for construction, contain a reasonable description of the project facilities proposed to be constructed, contain a statement as to benefits to be conferred by the proposed project and the distribution of such benefits and contain an estimate of the costs of the proposed project. The urban-county council of such government shall reveive such preliminary engineering and financing report at a regular meeting, shall thereafter study and evaluate the same, and by duly enacted ordinance either approve the preliminary engineering and financing report as submitted, disapprove such report, or amend and approve same in its sound discretion.

(3) Upon approval of the preliminary engineering and financing report, or amendment thereof and approval thereof as amended, by the urban-county council of such urban-county government, such council shall formally initiate proceedings for the acquisition and financing of the proposed wastewater collection project by the enactment of an ordinance to be designated as the ordinance of initiation, in which public announcement shall be made of the wastewater collection project proposed to be acquired, constructed and financed, the identification of properties proposed to be benefited by such project, which benefited properties may be identified by naming the public way upon which the benefited properties abut, if any, or by geographical location, or by metes and bounds or other appropriate description. The

ordinance of initiation shall recite the nature and scope of the wastewater collection project being initiated by the government, shall give a preliminary estimate of the costs thereof, shall determine that each lot, parcel and tract of land named and identified in the ordinance of initiation as benefited property shall be afforded benefits by the project unless specifically excluded by such ordinance and shall order that a public hearing be held in respect of the proposed wastewater collection project.

(4) In all succeeding proceedings, the government shall be bound and limited by the ordinance of initiation with regard to the nature, scope and extent of the proposed wastewater collection project, but shall not be bound by or limited to the preliminary estimate of the costs of the proposed project. The costs of such project shall be determined upon the basis of construction bids publicly solicited by such urban-county government as required by KRS 67A.871 to 67A.894, and shall be binding upon the government and upon the owners of benefited properties, whether they turn out to be equal to, below, or above, such preliminary estimate of costs.

(5) In the ordinance of initiation, the urban-county council shall make findings of fact regarding the degree and nature of benefit which will accrue to benefited properties by the installation of the project. In the event the urban-county council determines as a fact that groups of benefited properties, or all

benefited properties, will be affected and benefited in substantially the same manner and to substantially the same degree, such urban-county council may determine that it is appropriate to classify benefited properties into one or more assessment zones based upon the similarity of benefits to be derived by benefited properties from installation of the project, and in such case, the urban-county council may deem all benefited properties within a particular assessment zone to be equally benefited and therefore equally treated for purposes of levying improvement benefit assessments to provide funds to pay the costs of the project. It is the intent of KRS 67A.871 to 67A.894 to vest in the urban-county council of any urban-county government undertaking a project, authority to make findings of fact in order to classify properties according to benefits conferred from the construction of projects, and such urban-county council may, as aforesaid, by appropriate ordinance, determine that identified groups of benefited properties will be benefited similarly by a project and shall therefore be treated equally for purposes of levying improvement benefit assessments upon such benefited properties. The urban-county council may accept and rely upon any pertinent data in making such findings of fact, including, the size and diameter of sanitary sewer service connections to be made available. In the event the urban-county council of the government shall determine that all properties situated within a particularly described classification or zone shall not receive

substantially equal benefits from the project. the urban-county council shall determine in the ordinance of initiation that such properties shall be assessed for benefits conferred based upon the relative assessed land valuation of each benefited property as it relates to the aggregate assessed land valuation of all benefited properties within such particularly described classification or zone initially, when property owners shall be afforded the the opportunity to pay improvement benefit assessments on a lump sum basis, and subsequently, during each annual period when bonds issued to provide for payment of costs of the project not paid by lump sum payments shall be outstanding. Findings of fact made by any urban-county council in accordance with the provisions of this section shall be entitled to a presumption of regularity and accuracy when based upon receipt of, and consideration of, factual data and information described in this section.

(6) The ordinance of initiation shall provide that a public hearing shall be held in respect of the proposed project at a time and place which shall be specified in the ordinance of initiation, and shall give notice that at the public hearing any owner of benefited property may appear and be heard as to whether the proposed project should be undertaken, whether the nature and scope of the project should be altered, and whether the project shall be financed through the assessment of benefited properties and issuance of bonds in respect of assessments not paid on a lump sum basis, all as

proposed by the ordinance of initiation and as authorized by KRS 67A.871 to 67A.894.

(7) The ordinance of initiation shall be published pursuant to KRS Chapter 424, and shall designate an individual, who shall be a member of the urban-county council or any government officer, to preside at the public hearing. In the absence of a designation in the ordinance of initiation, the mayor of the government shall preside at the public hearing. Notwithstanding the foregoing, the public hearing shall not be deemed irregular or improper if it is in fact presided over and conducted at the designated time and place by any official of the urban-county government. (Enact. Acts 1976, ch. 371, § 5, effective March 30, 1976.)

**67A.876. Notice of public hearing.**—The urban-county government shall cause notice of the public hearing ordered to be held by the ordinance of initiation to be afforded to all owners of property proposed to be benefited by the project and to be assessed for the costs thereof. The notice shall be published pursuant to KRS Chapter 424, and in addition, such reasonable actual notice as is best suited to advise affected benefited property owners shall be given to owners of the benefited property using such methods as shall be determined by ordinance of the urban-county government to be the most practicable in the circumstances. The notice shall advise owners of benefited property that a public hearing shall be held in respect of the project and its financing, and that

assessments to pay the costs of the project are proposed to be levied against all benefited properties. (Enact. Acts 1976, ch. 371, § 6, effective March 30, 1976.)

**67A.877. Benefited properties—Later-connecting properties.**—(1) The properties to be benefited by construction of a wastewater collection project shall consist of all real properties which are thereby afforded a means of draining wastewater from such properties, whether such real properties consist of unimproved land or contain improvements. Benefited properties shall include all real properties which are directly contiguous and abutting to any proposed sewer, lateral, main, outfall line, transmission line, interceptor, sewer easement to contain a project facility, or other project facility into which sanitary discharge and drainage of wastewater may be accomplished, whether the project sewer facility be constructed by application of the proceeds of the bonds or from funds otherwise made available by the government. Provided, however, the urban-county council of the government undertaking a project may adopt reasonable rules and regulations in respect of benefited property, and may exclude real properties which the urban-county council deems appropriate for exclusion because of location, size or other special circumstances.

(2) The urban-county council of the government may determine, either in the ordinance of initiation or in subsequent proceedings, the necessity and

desirability in the interests of the public health, safety and general welfare, that properties other than the benefited properties be permitted to connect to a wastewater collection project in the future, and may make equitable provisions which may be adjustable from year to year as bonds are retired, whereby the owners of such later-connecting properties may, be paying charges for the privilege of connecting and by assuming assessment obligations, be placed as nearly as practicable on a basis of financial equity with the owners of property initially provided to be benefited and assessed.

(3) Benefited property owned by any city, county, or urban-county government (or owned by the United States of America or any of its agencies, if such property is subject ot assessment by act of congress), shall be assessed annually the same as private property, and the amount of the annual assessment shall be paid by the city, county, urban-county government or United States government, as the case may be.

(4) Benefited property owned by the Commonwealth of Kentucky, except property the title to which is vested in the commonwealth for the benefit of a district board of education pursuant to KRS 162.010, shall be assessed as follows: Before assessing the commonwealth, the urban-county council shall serve written notice on the secretary of the department of finance of the Commonwealth, setting forth

specific details, including the estimate aggregate total amount of any improvement benefit assessment proposed to be levied against any property of the Commonwealth relative to the project. Said written notice shall be served prior to the next regular session of the general assembly of Kentucky so that the amount of any specific improvement assessment may be included in the biennial budget report to be submitted to the general assembly. Payment of any assessment shall be made only from funds specifically appropriated for that assessment. If an amount sufficient to pay the total amount of an assessment has been appropriated, then the total amount shall be paid, as and when due. If an amount sufficient only to pay annual assessment has been appropriated, then only the amount of the annual assessment shall be paid. The amount of the assessment shall be certified by the commissioner of finance of the urban-county government to the executive department for finance and administration, which shall thereupon draw a warrant upon the state treasurer payable to the government and the state treasurer shall pay the same.

(5) In the case of property the title to which is vested in the commonwealth for the benefit of a district board of education, the amount of the annual assessment shall be paid by the city, county, urban-county government or other local governmental agency or authority which represents the taxing authority of such board of education.

(6) No benefited property shall be exempt from assessment, except as herein provided. (Enact. Acts 1976, ch. 371, § 7, effective March 30, 1976; 1978, ch. 155, § 41, effective June 17, 1978.)

**67A.878. Public hearing.**—A public hearing shall be held at the time and place designated in the ordinance of initiation. Any person qualifying under the provisions of KRS 67A.875(7) shall preside and conduct the hearing. The presiding officer shall cause reasonable notes or minutes of the proceedings to be made, and they shall be submitted in writing to a subsequent regularly scheduled meeting of the urban-county council of the government. Any owner of property proposed to be benefited by the proposed wastewater collection project may appear and be heard at the public hearing, either in person or by a duly authorized representative. Any such owner of benefited property may submit to the presiding officer or to the designated clerk a written instrument in which such owner of benefited property is identified by name, address and designation of benefited property, and containing a statement of any reason for advocating or objecting to any of the aspects of the proposed project, and such written instruments shall be attached to and included in the written report of the hearing. Whether or not any such written instruments are submitted, the presiding officer at the public hearing may require those in attendance to execute an attendance roster, to properly identify themselves as

owners of benefited property or representatives of the owners, and may impose reasonable rules upon the conduct of the public hearing. The estimated costs of the project shall be disclosed at the public hearing, or, if construction bids for construction of the project have been received, the results of the bidding shall be disclosed. A report of local health agencies may be made a part of the public hearing, and government may cause distribution of informative materials and summarizations of engineering and health reports to be carried out at the public hearing. The public hearing may be adjourned to convene again, and from time to time either at a time and place announced at the public hearing or upon public notice of the time and place to be given in any manner the government may determine. (Enact. Acts 1976, ch. 371, § 8, effective March 30, 1976.)

**67A.879. Consideration of written report of public hearing—Ordinance of determination.**—At a subsequent regular meeting of the urban-county council of the government, the written report of the public hearing shall be publicly received and considered by the urban-county council. At the meeting, or any subsequent, properly convened, regular, adjourned or special meeting of the urban-county council prior to enactment of the ordinance of determination, owners of benefited properties may again be heard in person or by representatives. At any subsequent regular meeting, the urban-county council, following receipt of facts and data determined by it to be sufficient in

the premises regarding the wastewater collection project, including the report of public hearing, data submitted by local health authorities, if any, engineering information and data, statements by owners of benefited properties, and any other data deemed relevant, may adopt an ordinance, designated as the ordinance of determination, with respect to the project which may provided for either: (1) the undertaking of the project with provision for the financing thereof as previously set forth in the ordinance of initiation; (2) the abandonment of the project; or (3) the alteration of the nature and scope of the project, in which event the procedure for ordinance of initiation and public hearing shall be repeated pursuant to the provisions of KRS 67A.871 to 67A.894. The ordinance of determination shall be published as provided by KRS Chapter 424.

**67A.880. Action by property owner for relief from ordinance of determination.**—(1) Any owner of property to be benefited by the wastewater collection project may, within thirty (30) days after passage and publication of the ordinance of determination:

(a) File an action in the circuit court of the county in which the urban-county government is situated seeking relief by declaratory judgment, injunction or otherwise; or

(b) File in the office of the clerk of the urban-county government a written statement of intent to file such an action endorsed by a licensed attorney-at-

law to the effect that in his opinion his client has a reasonable and legitimate probable cause for such proposed litigation, in which event the time for filing the action shall be extended for fifteen (15) days after the date the statement is filed.

(2) In the event of the occurrence of either (a) or (b) above, all proceedings of the government with respect to the proposed wastewater collection project shall be abated until final judicial determination of the controversies presented thereby. In the absence of action by any owner or property proposed to be benefited as herein provided, the provisions of the ordinance of determination shall be final and binding. After the lapse of time as herein provided, all actions by owners of properties to be benefited shall be forever barred.

**67A.881. Action by council when ordinance of determination upheld.**—If the ordinance of determination authorizes the undertaking of the project and the financing thereof according to the plan of financing enacted by the ordinance of initiation, and if owners of benefited properties do not institute action as permitted by KRS 67A.880, or if such action be taken and shall result in final judgment permitting the government to proceed according to the ordinance of initiation and the ordinance of determination, the urban-county council of the government may proceed to implement and finance the costs of construction of the project as authorized by KRS 67A.871 to 67A.894.

**67A.882. Bids—Apportionment of cost—Alternative payment methods and funding.**—(1) Proposals for the construction of the project shall be solicited upon the basis of submission of sealed, competitive bids after advertisement by publication pursuant to KRS Chapter 424, following adoption of the ordinance of determination and expiration of the permissive litigation period, or alternatively, the conclusion of litigation in a manner favorable to the project.

(2) After all costs of the project have been determined upon the basis of the construction bidding, the costs shall be apportioned among the owners of benefited property pursuant to the method of assessment previously determined in the ordinance of initiation and the ordinance of determination. However, in determining the apportionment of individual costs for purposes of affording to the owners of benefited property the privilege of paying the assessment levies in full on a lump sum basis, the urban-county government shall exclude amounts required for the creation of the debt service reserve fund, capitalized interest costs, and any bond discount which the government may allow in connection with the sale of bonds to provide funds for the costs of construction not paid initially by the owners of benefited properties on a lump sum basis.

(3) The owners of benefited property shall be notified in writing of the exact amount levied against their individual properties, which amount may, at the

option of each owner, be paid in full on a lump sum basis within thirty (30) days. Such owners shall be notified that in the event the costs of construction of the project exceed lump sum payments and bond proceeds an additional apportionment of costs will be made and that all owners who paid the initial improvement benefit assessment on a lump sum basis must likewise pay the additional assessment on the same basis. The statement submitted to such owners of benefited property shall additionally advise such owners that in the event such owners do not elect to pay the special improvement benefit assessment in full within the period of thirty (30) days from receipt, the urban-county government shall issue bonds pursuant to KRS 67A.871 to 67A.894 for the purpose of providing the cost of construction of the project, including the debt service reserve fund, if paid from bond proceeds, capitalized interest costs, any bond discount, together with all other costs, as the term is defined in KRS 67A.871(5). The owners of the benefited property shall further be advised that bonds and the interest thereon shall be amortized by annual improvement benefit assessment levies against all benefited properties which have not made lump sum payments in accordance with the method of apportionment provided by the ordinance of initiation and the ordinance of determination.

(4) At the conclusion of the thirty (30) day permissive lump sum payment period, the urban-county

council shall determine the aggregate principal amount of improvement benefit assessments paid in full by owners of benefited property; shall order the deposit of the moneys in a trust account which shall be used solely to pay the costs of construction of the project; shall aggregate all unpaid improvement benefit assessments for purposes of determining the principal amount of bonds to be issued by the government to provide the costs of the project; shall compute the debt service reserve fund in respect to the bonds, if the fund is to be capitalized from bond proceeds; shall determine the bond discount and capitalized interest which shall be applicable to the issue of bonds; and shall proceed to complete the financing of the costs of construction of the project through the adoption of the ordinance of bond authorization as provided in KRS 67A.883 and the sale of bonds authorized pursuant thereto. Provided, however, that the ordinance of bond authorization may, as provided in KRS 67A.884, provide that, in lieu of issuing bonds, the government may contract with the Kentucky pollution abatement authority for the financing of the project, in which latter event all procedures with respect to the annual assessment of benefited properties shall continue in full force and effect, but the urban-county government shall secure funding for the project through the Kentucky pollution abatement authority in lieu of issuing bonds and shall pledge to and pay to the authority the annual improvement benefit assessment levies and enforce them for the security of the financing.

**67A.883. Ordinance of bond authorization—Trust indenture.**—(1) Following compliance with the foregoing provisions of KRS 67A.871 to 67A.882, the urban-county council of the government may adopt an ordinance known as the ordinance of bond authorization. The ordinance of bond authorization shall make provision, for the following:

(a) Determining and confirming the nature and scope of the project, the real properties to be benefited thereby (which shall be all benefited properties identified in the ordinance of initiation and the ordinance of determination, excepting properties as to which lump sum payment of improvement benefit assessment levies has been made within the statutory period), the exact method of assessment of benefited properties and the costs of the projects;

(b) Authorizing the issuance of bonds of the government from time to time which shall be designated "improvement lien bonds" and which shall additionally identify the project by reference to its name or title;

(c) Determining the principal amount of the bond issue, subject to the provisions of KRS 67A.891;

(d) Establishing the denomination and maturity dates of the bonds, which may be term or serial maturities not to exceed thirty (30) years from date of issue, and providing for the issuance of the bonds in series, if so ordered, each such series to be equally

secured on a pari passus basis by improvement benefit assessments levied on all benefited properties and by liens in respect thereto;

(e) Levying an annual improvement benefit assessment effective upon the benefited properties pursuant to the assessed value basis according to either their respect assessed land values as determined for purposes of general ad valorem taxation, or upon a basis of equality by zones, pursuant to findings of fact by the urban-county council that benefited properties in particular zone classifications are to be treated equally for assessment purposes because of substantial equality of benefits conferred, such assessments to be made without regard to any constitutional or other limits otherwise applicable to taxation for general ad valorem purposes, the annual rate of such improvement assessment to be fixed when regular county ad valorem taxes are levied and to be sufficient in each year to provide for the payment of the bonds and interest coupons as they mature; and, in each year until accrual of the debt service reserve requirement to be sufficient to provide in addition or sum equal to twenty percent (20%) of maximum annual principal and interest requirements, the same to constitute a debt service reserve fund as a precaution against possible default by reason of failures in the collection of the annual levies as hereinafter provided; provided, however, that in the event the government shall have provided that the debt service reserve requirement be financed from bond proceeds as one of

the costs of the project, such additional levies to accrue, the debt service reserve requirement shall be omitted, but it shall be promptly instituted at any time in order to maintain the debt service reserve requirement as its prescribed level;

(f) Covenanting with the holders of the bonds and coupons that until the payment in full thereof the government will levy annually an improvement benefit assessment upon each benefited property, as provided in the foregoing subsection (e) hereof; provided, that the government may provide by ordinance that certain benefited properties shall be omitted from assessment during initial periods not to exceed three (3) years because of construction scheduling;

(g) Covenanting with the holders of the bonds and coupons that until payment in full thereof, the government will pursue and exhaust at the expense of the government all remedies available to the government for the benefit and protection of the bondholders, including both termination of water service to delinquent real properties and enforcement of judgment and decretal sale of the liens upon benefited properties which are granted by KRS 67A.871 to 67A.894;

(h) Designating one or more places of payment of principal and interest within or without the Commonwealth;

(i) Specifying or omitting provisions for redemption and payment prior to stated maturities and the terms thereof;

(j) Providing for the payment by government of any and all reasonable and customary charges for the services of trustees and paying agents to the end that the holders of the bonds and coupons will receive the sums therein stipulated without deduction for such charges; and

(k) Any other provisions not contrary to law. The government is expressly authorized and empowered to finance any particular project by an issue of bonds which may be sold and delivered in one or more series, each of which series is equally and indistinguishably secured, as provided in KRS 67A.871 to KRS 67A.894, by improvement benefit assessments levied upon all benefited properties, and liens granted for the security of bondholders by KRS 67A.871 to 67A.894 on benefited properties shall apply to each benefited property and in favor of every bond of each such series, whenever issued.

(2) In the discretion of the urban-county council of the government, any improvement lien bonds or bond anticipation notes issued under the provisions of KRS 67A.871 to 67A.894 may be secured by a trust indenture by and between the government and a corporate trustee, which may be any trust company or bank having the powers of a trust company within or without the Commonwealth of Kentucky. The trust

indenture of the government providing for the issuance of improved lien bonds or notes may pledge or assign for the security of improvement lien bonds or notes all or any part of the totality of improvement benefit assessments levied, collected, enforced and received by the government. The trust indenture shall contain provisions for protecting and enforcing the rights and remedies of the bondholders as may be reasonable, proper and not in violation of law, including covenants and provisions setting forth the duties of the government in relation to the purposes to which improvement lien bond proceeds may be applied; the disposition and pledging of receipts of improvement benefit assessments; and the custody, safeguarding and application of all improvement benefit assessment revenues. It shall be lawful for any bank or trust company incorporated under the laws of the Commonwealth which may act as depository of the proceeds of bonds, notes or of government revenues, to furnish indemnity bonds or to pledge securities as may be required by the trust indenture of the government. Any trust indenture may set forth the rights and remedies of the bondholders and of the indenture trustee and may restrict the individual right of action by bondholders. In addition to the foregoing, any trust indenture may contain any other provisions as the government may determine to be reasonable and proper for the further security of the holders of the bonds. All expenses incurred in carrying out the provisions of the trust indenture shall be

treated as a part of the costs of the project and shall be paid from either the proceeds of the bonds or, during the life of the bond issue, from the proceeds of improvement benefit assessments levied against and collected from, benefited properties.

(3) All bonds issued under the provisions of KRS 67A.871 to 67A.894 shall have and are hereby declared to possess all of the qualities and incidences of negotiable instruments under the laws of Kentucky. The bonds may be issued in coupon or in registered form or in both, as the government may determine, and provision may be made for the registration of any coupon bonds as to principal only and also as to both principal and interest and for the reconversion into coupon bonds of any bonds registered as to both principal and interest. The government may sell the bonds in any manner either at public or private sale, and for any price as it may determine will best effect the purposes of KRS 67A.871 to 67A.894.

(4) Any government initiating a project pursuant to KRS 67A.871 to 67A.894 shall have and possess all powers and the authority set forth in KRS 58.150.

**67A.884. Assistance agreement with Kentucky pollution abatement authority.**—(1) Following enactment of the ordinance of initiation and the ordinance of determination, any urban-county government may enter into an assistance agreement with the Kentucky pollution abatement authority pursuant to the

authority of KRS Chapter 224A for the purpose of financing the costs of construction of a project pursuant to KRS 67A.871 to 67A.894. The Kentucky pollution abatement authority is hereby authorized to enter into an assistance agreement with any urban-county government for the purpose of providing, by the issuance of securities of the Kentucky pollution abatement authority, the costs of construction of any project instituted by any such government. Any such assistance agreement shall conform to the provisions of KRS Chapter 224A, except that repayment of a state grant made by the Kentucky pollution abatement authority to any urban-county government for any project shall be made from the proceeds of annual improvement benefit assessments levied against benefited properties by the urban-county government and remitted to the Kentucky pollution abatement authority as received, pursuant to KRS Chapter 224A. Provisions otherwise contained in KRS 67A.871 to 67A.894 for accrual of the debt service reserve requirement may be omitted if a comparable reserve is required funded by the Kentucky pollution abatement authority which must be repaid by any government contracting with the authority from assessment levies made against benefited properties.

(2) Any urban-county government may elect, following the completion of the preliminary procedures set forth in KRS 67A.871 to 67A.894, in lieu of issuing bonds, to finance the costs of construction

of a project not paid by payment of assessment levies on a lump sum basis pursuant to an assistance agreement with the Kentucky pollution abatement authority and pursuant to authority of KRS Chapter 224A, in which event the ordinance of bond authorization provided for in KRS 67A.833 shall provide for the obtaining of financing from the Kentucky pollution abatement authority in lieu of issuance of bonds, and all provisions of the ordinance of bond authorization relating to assessment of benefited properties for amortization of the costs of construction of the project shall relate to assessment of benefited properties for compliance with repayment provisions of the assistance agreement between the government and the Kentucky pollution abatement authority. In the event of such financing, proceeds secured from the Kentucky pollution abatement authority for construction of the project shall be treated, as provided in KRS Chapter 224A, and upon effectuation of the financing, all lump sum improvement benefit assessment payments shall be paid over to the Kentucky pollution abatement authority or its designee for application to the payment of costs of construction of the project. All security and enforcement provisions of KRS 67A.871 to 67A.894 shall apply in full to financing pursuant to either issuance of bonds or through the Kentucky pollution abatement authority.

**67A.885. Deposit of funds—Security—Interest.**—When any bonds are delivered and the proceeds are

received by the government, they shall be deposited in the a bank or trust company or combined bank and trust company, and to the extent the deposit may exceed insurance provided by federal deposit insurance corporation, the same shall be secured by a valid pledge of direct bonds or notes of the United States government or bonds or notes fully guaranteed thereby having at all times a market value equal to the undisbursed balance of such deposit; or shall be secured in any other manner as the urban-county council may approve. Costs of the project shall be paid from the proceeds of the bonds pursuant to such regulations and requirements as shall be determined by the government and incorporated into the ordinance of bond authorization. There shall be set aside into the sinking fund hereinafter created a sum from bond proceeds equal to all interest which will accrue on the bonds until the date when the first improvement benefit assessment levied in connection therewith will become due and payable, together with such further sum as may be provided in the ordinance of bond authorization, not to exceed interest on the bonds for a period of three (3) years. If provided in the ordinance of bond authorization, all or any portion of the debt service reserve requirement shall be set aside into the debt service reserve fund. If after completion, acceptance and payment of the work of all contractors and the payment of all costs of the project there shall remain an unexpended balance of bond proceeds, the balance shall be transferred to the sinking fund

created and maintained in connection with the project as provided by KRS 67A.871 to 67A.894.

**67A.886. Bonds not indebtedness of government.**—Each of the bonds shall bear on its face the statement that it has been issued under the provisions of KRS 67A.871 to 67A.894 and that it does not constitute an indebtedness of the government within the meaning of the Constitution of Kentucky. The bonds and the receipt of interest thereon shall not be subject to taxation. The bonds and the interest thereon shall be payable solely and only from the proceeds of the annual improvement benefit assessments levied by the government from time to time upon the properties benefited by the project identified in the bonds and from the debt service reserve fund; the government shall become directly and personally liable to the bondholders for any deficiencies which may arise as a direct result of failure by the government to pursue to exhaustion and in timely fashion all remedies lawfully available in the collection of such improvement assessments.

**67A.887. Annual levy of assessment against benefited property.**—The sum necessary to be raised annually for the sinking fund and consequent amortization of the outstanding bonds, whether all authorized bonds have been issued or not (together with the sum of any amounts required annually to pay trustees' fees, paying agents' fees, cost of administration of the project, and the cost of billing, collecting

and enforcing improvement benefit assessments, including fees of proper governmental bodies incident to placing assessment bills on tax statements, and collecting, enforcing and remitting same), shall be levied and assessed from time to time against the benefited properties pursuant to the prior determinations made by the government in respect of benefits received. If the urban-county council of the government has determined that all benefited properties within classified zones are substantially equally benefited and that all therein shall be assessed equally, the same assessment levy shall be made against each benefited property within a classified zone. In other cases, if any, the sum necessary to be raised annually for amortization of the bonds shall be levied and assessed against the benefited properties in the proportion that the assessed value of each individual lot, parcel or tract for urban-county government ad valorem taxation shall bear to the whole assessed value of all the benefited properties as shown by the records upon which urban-county government ad valorem taxation may from time to time be based. Where there is no such record, as in the case of public property or property owned by religious, charitable or educational institutions, the same (except that owned by the United States government) shall be specially assessed by the proper assessing officers and for such special assessment reasonable compensation shall be paid. Any such special assessment shall be subject to all procedures for equalization and judicial review as may

be provided by law in connection with ordinary assessments.

**67A.888. Time of levy—Date taxes due—Collection of improvement benefit assessments.**—The annual improvement benefit assessment for the project shall be levied by the government against benefited properties when the levy for general urban-county government taxes is made; and such improvement benefit assessment levy shall be due at the same time when general urban-county government taxes are due and shall be subject to the same penalties and accrual of interest in the event of nonpayment as in the case of the general urban-county government taxes. Improvement benefit assessments shall be collected by the urban-county government officers charged with responsibility for the collection of ad valorem taxes and shall be enforced in like manner.

**67A.889. Lien for annual improvement assessment.**—Each annual improvement assessment, with any penalty or interest incident to the nonpayment thereof, shall constitute a lien upon the lot or parcel of benefited property against which it is assessed. The lien shall attach to each lot or parcel of benefited property as the same is described by the owner's deed of record in the county clerk's office at the time of the publication of the ordinance of initiation, as provided, and thereupon shall take precedence over all other liens, whether created prior to or subsequent to the publication of the ordinance, except state and county

taxes, general municipal taxes, and prior improvement assessments and shall not be defeated or postponed by any private or judicial sales, by any mortgage, or by any error or mistake in the description of the property or in the names of the owners. No error in the proceedings of the urban-county council shall exempt any benefited property from the lien for the improvement assessment, or from the payment thereof, or from the penalties or interest thereon, as herein provided. No error in the proceedings of the urban-county council shall exempt any property from liability for payment of any annual improvement assessment, or for any interest or penalty incident to nonpayment thereof. The urban-county council of the government shall have power to make such rules and orders as may be required to properly administer the project.

**67A.890. Proceeds to be kept in separate account—Sinking fund.**—The proceeds received by the government from each annual improvement assessment levy made in connection with the project, as authorized by KRS 67A.871 to 67A.894, shall be segregated from and kept always separate and apart from all other receipts of the government from all other sources, and shall be deposited in a separate and special account in a financial institution in an account so specially designated by number or other designation as to identify it in such manner as to distinguish the receipts and deposits from the project from the receipts and deposits from every other project, and

from any other account or fund of the government. It shall constitute the "sinking fund" referred to in KRS 67A.871 to 67A.894.

**67A.891. Uses of sinking fund.**—All sums received and deposited in the sinking fund shall be held inviolate and applied by the government, or the trustee in respect to the bonds solely for the financing of the identified project. The amount levied, collected and deposited in the sinking fund from initial improvement assessment levies in connection with the project, in excess of maturing principal and interest of the bonds and equal to twenty percent (20%) of maximum annual principal and interest requirements, for the purpose of creating the debt service reserve fund shall be held in the sinking fund as a special reserve for that purpose. Such excess levies shall continue annually until the debt service reserve requirement has been accrued in the debt service reserve fund in respect of all outstanding bonds; provided that the debt service reserve requirement may be funded from the proceeds of the bonds. If, at the time of any annual levy of the improvement assessment, the sum held in the sinking fund as debt service reserve fund shall exceed the debt service reserve requirement, such excess may be taken into account in fixing the rate of the improvement benefit assessment for the ensuing year; and if the amount so held in the debt service reserve fund is below the specified level, the next annual improvement assessment levy shall be increased

in a corresponding manner so as to accrue the debt service reserve requirement. In making the improvement assessment levy for the year preceding the final maturity of bonds for any project, the urban-county council may take into account, and make allowance for the amount held in the sinking fund of the project as the debt service reserve fund; and if in making the levy the urban-county council shall miscalculate and provide funds insufficient to pay the final maturing principal and interest, the governing body shall be authorized, and shall be required, to make a subsequent improvement assessment levy upon the benefited properties sufficient to make up the deficiency, with interest to date of payment. If the procedures required by KRS 67A.871 to 67A.894 shall result in a surplus after payment and discharge of the bonds, and all interest thereon to date of payment, such surplus shall be refunded, pro rata, to the owners of benefited properties, as determined at the date the surplus is ascertained by the governing body to exist.

**67A.892. Insufficiency of bonds.**—If, by reason of miscalculation or the happening of unforeseen events or conditions, the proceeds of the bonds authorized by the ordinance of bond authorization should prove to be insufficient to provide for the completion of the project and the payment in full of all costs thereof, the urban-county government shall be responsible for any such deficiency.

**67A.893. Sewer connection mandatory.**—In the interests of the health, safety and welfare of the general public and for the protection of the public health, the government is authorized and empowered, by ordinance, to mandatorily require the owners of all benefited properties to cause any improvements capable of the generation of wastewater situated on such benefited properties to be connected to the facilities of the wastewater collection project. Urban-county governments are authorized and empowered to covenant with the holders of bonds to order mandatory connection of all improved premises situated upon benefited properties to the facilities of a project financed pursuant to KRS 67A.871 to 67A.894.

**67A.894. Return of funds if project not completed.**—If an urban-county government has taken any steps under KRS 67A.871 to 67A.893 to provide for, construct or finance any project, and for any reason the project cannot be completed according to the provisions of KRS 67A.871 to 67A.893, the government shall return all improvement benefit assessments paid in full by owners of benefited property on a lump sum basis to the owners thereof. Any interest earned on such prepayments shall be applied by the government to the payment of any costs resulting from effort to carry out the project, and any remainder shall be returned, pro rata, to such owners of benefited property. Thereafter, such urban-county government may proceed to finance and construct the project in any other manner authorized by law.

## ENTRY OF APPEARANCE AND PROOF OF SERVICE

I, Mary Ann Delaney, a member of the Bar of the Supreme Court of the United States of America, enter an appearance as attorney of record for Appellees, Lexington-Fayette Urban County Government; Edgar Wallace, John Wiggington, Joe Jasper, Anne V. Gabbard, Mary C. McNeese, J. H. Combs, Eleanor H. Leonard, Fred Brown, William Rice, Lyman Ginger, Paul Rose, Carol Jackson, Donald Blevins, Ann Ross and James Todd, Members of the Lexington-Fayette Urban County Council; James G. Amato, Mayor of the Lexington-Fayette Urban County Government; and Gordon R. Garner, Commissioner of Public Works of the Lexington-Fayette Urban County Government. I hereby certify that on the 8th day of March, 1984, I served three (3) copies of the foregoing Motion to Dismiss Appeal or in the Alternative to Affirm Judgment and Appendices, by causing true copies thereof to be deposited in a United States post office, at Lexington, Kentucky, with first-class postage prepaid, addressed to counsel of record for Appellants herein, Hon. William C. Jacobs, 173 North Limestone Street, Lexington, Kentucky 40507.

That on the 29th day of December, 1983, the Attorney General of the Commonwealth of Kentucky, by counsel, served his NOTICE OF INTENT NOT TO INTERVENE, acknowledging receipt of the Notice of

Appeal under Rule 10 of the Rules of the Supreme Court of the United States filed by Appellants in the Supreme Court of Kentucky, informing the Court and the parties that the Attorney General did not intend to intervene.

The undersigned further certifies that a true copy hereof was served upon the Clerk of the Supreme Court of Kentucky, such clerk being the clerk of the court whose judgment is sought to be reviewed by causing a true copy hereof to be deposited in a United States post office, at Lexington, Kentucky, with first-class postage prepaid, addressed as follows to wit: Clerk, Kentucky Supreme Court, Room 209, Capitol Building, Frankfort, Kentucky 40601. Further the undersigned certifies that a true copy hereof was served upon the Clerk of the Fayette Circuit Court, such clerk being the clerk of the court possessed of the record herein, by causing a true copy hereof to be deposited in a United States post office, at Lexington, Kentucky, with first-class postage prepaid, addressed as follows to wit: Robert M. True, Clerk, Fayette Circuit Court, Room 200, Courthouse, Lexington, Kentucky 40507.

The undersigned states that all parties required to be served are the parties named above, accompanied by the addresses of their respective counsel, and that all such parties have been served, as herein certified.

MARY ANN DELANEY
Lexington-Fayette Urban
County Government
Department of Law
200 East Main Street
Lexington, Kentucky 40507

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NO. 83-1323

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

RICHARD C. COX, ET AL. APPELLANTS

V.

LEXINGTON-FAYETTE URBAN
COUNTY GOVERNMENT, ET AL. APPELLEES

* * * * * *

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ON APPEAL FROM THE SUPREME COURT OF KENTUCKY

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# APPELLANTS' BRIEF OPPOSING APPELLEES' MOTION UNDER RULE 16

WILLIAM C. JACOBS
173 NORTH LIMESTONE STREET
LEXINGTON, KENTUCKY 40507
(606) 254-9086

ATTORNEY FOR APPELLANTS

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For their Response to Appellees' Motion to Dismiss Appeal, or in the alternative, to Affirm Judgment, Appellants state:

ARGUMENT

At page 7 of their Motion to Dismiss this Appeal, Appellants concede that Londoner v. Denver, 210 U.S. 373, 52 L.Ed. 1103, 28 S.Ct. 708 (1907) holds that due process requires that a hearing upon the assessment itself must be afforded property owners before the tax becomes irrevocably fixed. However, Appellees contend that the rule of Londoner does not apply (1) where the General Assembly itself has fixed the specific amount of the assessment, or (2) where a municipal legislative body has been granted full legislative power over the subject matter by the state.

The thrust of Appellees' Motion to Dismiss, then, is that Appellants were not entitled to a due process hearing, prior to the assessment tax becoming irrevocably fixed. There is no authority in Appellees' Motion, or otherwise, that (1) the General Assembly

itself has fixed the specific amount of the assessment, or (2) that the Appellee Urban County Council has been granted full legislative power over the subject matter by the state.

The Supreme Court of Kentucky, itself, in Conrad v. Lexington-Fayette Urban County Government, Ky., 659 S.W.2d 190, 197 (1983), the opinion from which this appeal was taken held:

> "If a property owner is given an opportunity to be heard at some time during the assessment proceedings before the liability of his property is fixed, due process is satisfied." (Emphasis added)

The Appellees' grounds for dismissal of this appeal are at odds with the opinion of the Kentucky Supreme Court, from which Appellees took no cross-appeal. Suffice it to say, that the authorities cited by Appellees, suggesting that Appellants were not entitled to a due process hearing before liability for the assessment attached have no place in this appeal. If (1) the General Assembly had fixed the specific amount of the

assessment itself (which it did not), or if (2) the legislative body of the Urban County Government were autonomous (which it is not), the Supreme Court of Kentucky certainly would have said so.

Appellees' contention (at page 9 of their Motion) that Appellants should await enforcement of the special assessment to contest the amount, only reinforces the justification for review by this court of this appeal. The Kentucky Supreme Court having held that Appellants were, indeed, entitled to a hearing before liability attached for the assessment, and having, further held (incorrectly as Appellants contend) that the hearing was held "at a meaningful time and (in a meaningful) manner" (659 S.W.2d 190, 197), dismissal of this appeal would result in Appellants being faced with an insurmountable hurdle to a challenge by these Appellants of the amount of the assessment in the future. Appellees do not even suggest that Appellants have had a hearing on the amount of the special assessment. If this appeal is dismissed,

any attempted challenge by these Appellants to the amount of the assessment in the future, would be met head on by the defense of the doctrine of issue or claim preclusion, which Kentucky courts have adopted. Sedley v. City of West Buechel, 461 S.W.2d 556 (1970). The Appellees' strategem, then, is to seek dismissal here, contending that the appropriate time for Appellants to challenge the amount of the assessment is in the future, knowing that an Order declining jurisdiction by this court may not be cited for any purpose. Then, Appellees would be in the position to assert preclusion as a defense to any future challenge to the amount by Appellants.

As authority that due process was satisfied, the Kentucky Court, at page 197, cited Shaw v. City of Mayfield, 204 Ky. 618, 265 S.W.13 (1924), without comment. Shaw, at page 265 S.W.13, 14 held:

> "The hearing before the council as provided in the ordinance and in the statute must be a hearing on the merits, such a hearing as constitutes a valid hearing at common law. It includes the right to be heard by word of mouth and also to introduce proof and to be

> heard by counsel. If such a hearing is not given before the council, the assessment made by it cannot be enforced. Londoner v. Denver, 210 U.S. 285, 28 Sup.Ct. 708, 52 L.Ed. 1103." (Emphasis added)

It must be remembered that under KRS 67A.875(6), the public hearing restricted the owner of benefited property to be heard on only the following three matters:

> "...as to whether the proposed project should be undertaken, whether the nature and scope of the project should be altered, and whether the project shall be financed through the assessment of benefited properties and issuance of bonds in respect of assessments not paid on a lump sum basis...." KRS 67A.875(6).

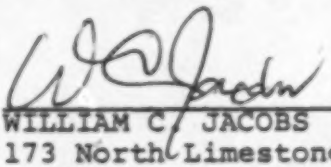
The Kentucky court in Conrad, at page 197 noted that property owners "were given an opportunity to speak at the public hearing as required by statute." The superficiality of the public hearing, as well as the fact that the public hearing was but a question and answer session with no right or opportunity to challenge the amount of the assessment is evident from the report of that public hearing which has been certified and transmitted to this court from the record below.

The Appellants had neither the opportunity or right to challenge the amount of the assessment before liability for it attached. The last sentence of KRS 67A.880(2) statutorily prohibits any civil action, other than the one which led to this appeal. That statute, as well as the doctrine of res judicata (preclusion), prevent a challenge by these Appellants to the amount of this assessment after liability for it attached. Due process has been denied.

CONCLUSION

It being clear that this court's ruling in Londoner v. Denver, 210 U.S. 373, 52 L.Ed. 1103 28 S.Ct. 708 (1907) establishes Appellants' due process right to a hearing on the amount of the assessment before liability for it attached, and the Kentucky court having acknowledged that Appellants were entitled to a due process hearing before liability attached, but neglected to include in that right, Appellants' entitlement to a hearing as to the amount, since KRS 67A.875(6) permits no such hearing, this court ought to note probable jurisdiction, in light of the Supremacy Clause [Article 6(2)] of the U.S.

Constitution so as to declare KRS 67A.875(6) violative of the due process clause of the 14th Amendment to the U.S. Constitution.



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PROOF OF SERVICE

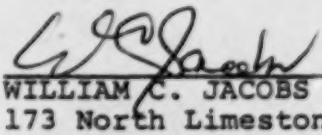
I, William C. Jacobs, as attorney of record for the Appellants herein, certify that on the 22 day of March, 1984 I served three (3) copies of the foregoing Appellants' Brief Opposing Appellees Motion Under Rule 16 by causing true copies hereof to be deposited in a United States post office, at Lexington, Kentucky, with first-class postage prepaid, addressed to the respective counsels of record for such Appellees, at their respective post office addresses of such counsel, as hereinafter set forth, to wit: for Appellees other than Lexington-Fayette County Health Department by mailing same to Hon. Mary Ann Delaney and Suzanne Shively Havens, Lexington-Fayette Urban County Government, Department of Law, 200 East Main Street, Lexington, Kentucky 40507; for Appellee, Lexington-Fayette County Health Department, Hon. Phillip D. Scott, Greenebaum, Doll & McDonald, 333 West Vine Street, Lexington, Kentucky 40507.

The undersigned further certifies that a true copy hereof was served upon the Clerk

of the Supreme Court of Kentucky, such clerk being the clerk of the court whose judgment is sought to be reviewed by causing a true copy hereof to be deposited in a United States post office, at Lexington, Kentucky, with first-class postage prepaid, addressed as follows to wit: Clerk, Kentucky Supreme Court, Room 209, Capitol Building, Frankfort, Kentucky 40601. Further the undersigned certifies that a true copy hereof was served upon the Clerk of the Fayette Circuit Court, such clerk being the clerk of the court possessed of the record herein, by causing a true copy hereof to be deposited in a United States post office, at Lexington, Kentucky, with first-class postage prepaid, addressed as follows to wit: Robert M. True, Clerk, Fayette Circuit Court, Room 200, Courthouse, Lexington, Kentucky 40507.

The undersigned states that all parties required to be served are the parties named above, accompanied by the addresses of their

respective counsel, and that all such parties have been served, as herein certified.



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